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WISCONSIN REPORTS

170

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

NOVEMBER 4, 1919—FEBRUARY 10, 1920

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OF THE

SUPREME COURT OF WISCONSIN

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MEMORANDA.

Mr. Chief Justice WINSLOW and Mr. Justice KERWIN took no part in the decision of the cases reported in this volume on pages 579–639.

ERRATA.

VOL. 169.

Pages 150 and 151 are transposed.
Page 325, line 11. For defendant, read plaintiff.
Page 373, par. 1, line 4 of syllabus. For sec. 4096, read sec. 4069.
Page 375, line 12. For sec. 4096, read sec. 4069.

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IN MEMORIAM.

FRANK A. ROSS.

On the 4th day of November, 1919, Mr. John A. Murphy of Superior presented the following

Memorial of the Douglas County Bar Association.

May it please the Court:—By these simple printed words we reverently pay the last tribute to poor FRANK ROSS. We loved him well in life, we speak him well in death.

Judge Ross was born March 24, 1856, and died January 16, 1919. He was appointed judge of the Eleventh circuit September, 1910, and by subsequent elections occupied the bench until his death.

Judge Ross came into being in the strictly pioneer days, in the period just preceding the Civil War—in the midst of a hostile Indian country—in the "forest primeval"—at the confluence of the broad Mississippi and the beautiful St. Croix, at Prescott, Wisconsin. He was bred on the banks of the Father of Waters, in one of nature's beauty spots, "where summer first unfaulds her robes, and there the longest tarry." He was bred in old Pierce county, "where the meadow grass is blue," where the plum and apple blossoms, like white stars, glow in a firmament of green; where the air was resonant with the warbled melody of sweet-voiced birds and redolent with the perfume of many flowers.

He was born in the heroic Northland, where nature's primeval bounty beckoned to the strong and brave to come and conquer. He was schooled in the "lore of fields and brooks." He fished these streams in infancy in the way the caveman fished, while around and above him was God's majestic valleys and His silent forest; "where the silence hung so heavy you were half afraid to speak."

Then these streams were little vexed with trade or commerce—a few scientists, a few missionaries, a few traders, some *coureur du bois,* some explorers, a few pioneer settlers were the only invaders then of this mighty kingdom, the Upper Mississippi Valley.

With something of oriental pageantry a few early but now immortal names claim the attention: Marquette, Hennepin, La Salle, with their small flotillas of canoes manned by the couriers—bearing and wielding the cross of Christ as the only weapon in the conquest of the pagan. San Croix, purveyor of foods and liquors to

Hennepin, served so well in that capacity, that the night of the discovery of the smaller river the river and country was not only dedicated to France but named in honor of San Croix.

It was into this little settlement at Prescott, in the silence of the big, green forest, in the days when earth was young, that FRANK Ross came. Then there was no Minneapolis, no Duluth, a primitive log-house settlement in St. Paul. The great prairies of the West were the undisputed domain of the savage. His infant eyes looked upon the sturdy pioneers, among them his father and mother, walking into the forest,—peaceful, resolute, God-fearing people, with standards set more nobly than the crusaders. Nothing above them but God's own sky, with privation on every hand, commencing the battle with the forest. Then came the building of the cabin and the little family house; and the cabin was a shrine, and in it was love and devotion and duty; and his pioneer mother, like an angel of hope, shed the luster of her affection over the little place, when by the log cradle she sat and sung soft and low the lullaby of love.

I speak of this environment because in it and out of it developed and sprang those habits of industry, devotion, and moral fiber that strengthened this boy for the arduous career that lay ahead. When the Judge was six or seven years old came the New Ulm massacre, not far up the Minnesota river. The settlers at Ellsworth and Prescott built log stockades and therein assembled the women and children, and there the men stood guard as heroic as puritan or cavalier in defense of family and home. An environment of want and a habit of hard toil in infancy and youth is a sure omen, if not an absolute essential, to ultimate success. These were the uncomprehended but priceless heritages that were handed on from toiling pioneer fathers and sacrificial mothers to their children of that day and age. The good habit of toil, early acquired, is as difficult if not as impossible of breaking as the vicious habit of sloth likewise acquired in infancy in an environment of wealth.

And thus equipped from early and constant toil and sacrifice and under the guidance of Christian training, young Ross went out to meet the world. And oh! he met the world with a smiling face. And through all the surging years of his life that smile of hope and peace was ever on his face. No storm was ever black enough, no disaster ever appalling enough, no gloom ever deep enough to drive away that auroral smile.

"Judge not the Lord by feeble sense,
But trust Him for His grace,
Behind a frowning providence,
He hides a smiling face."

Frank A. Ross.

It is said that God has not put all his sunbeams into corn and wheat and flowers. On the face of his rarely chosen few he radiates the message divine.

"Like a glow-worm golden,
In a dell of dew—
Scattering unbeholden
His aerial hue."

I say that there are no wasted sunbeams; I say that the man who animates his soul into melody and mirth and hope and is able to smooth one wrinkle on the brow of care, is able to change one moan or sob into a song, is able to wipe away one tear and put in its place a jewel of joy, is a public benefactor.

FRANK seemed to accept things as they were. He accepted both victory and defeat with equanimity. His exterior was as gentle and placid as I have ever seen. His was the loveliest character I ever knew in man. I have seen that loveliness equaled in children, but never equaled in any man. In his life of far-flung endeavor and effort he had of course his heartaches and disappointments, but he seemed to gild every grief with his rare smile. Whatever his torments he buried them deeply in the depths of his warm heart.

"For the test of the heart is trouble,
And it always comes with the years,
And the smile that is worth the homage of earth,
Is the smile that shines through tears."

His cheer and hope abided with him in sickness and in health. When there fell on him the sudden and untimely blight of illness, and all through the tortured, purgatorial months when the angels of life and death were conjuring his destiny, his was the abiding faith, the beauteous, bountiful, spiritual strength, the buoyant spirit that triumphed over pain and misery. In those grim days and months of torture when God's portals were slowly opening, when the insoluble mysteries of the future life were of the warp and woof of his contemplation, he turned the sunshine of his soul upon the problems, and with courage and cheer met even death with a smiling face.

"Death comes with a crawl or comes with a pounce,
And whether he's slow or spry,
It isn't the fact that you're dead that counts,
But only, *how* did you die?"

I have thus adverted to the beauties of his character in detail because this in my judgment was the medium through which he took his strongest hold upon the world. His loving, blameless life, his spiritual ascendency—so rare in a world of guile,—attracted to him most powerfully the elements in society who seek

justice and truth and righteousness. He conquered by gentle touch and honest impact, where elemental power and intellectual dominance would fail.

His early law preparation was but elementary. He was admitted to the bar at twenty. He never was a scholastic or toiling student—he didn't need to be. So closely was his mind attuned to abstract justice that it was easy for him to guess aright. He had a marvelous keenness of insight, an almost uncanny forecast, a swift divination of the average problem. He was handy at the craft-work of his profession. It was easy for him to handle large business affairs. He could pilot clients around the shoals; he was a great pacificator; he could bring together the warring factions; he could tie up disputations in harmonious contracts. He never bothered the courts except as a last resort.

His early experience was varied. He worked on a farm, taught school, sold sewing machines, peddled lightning rods, collected machinery notes, was city councilman and city attorney at Prescott; was district attorney of Pierce county; he sang in the village choir and taught singing school. He handled in his early law career large and small business—he liked one as well as the other. He tried cow cases before justices of the peace, and was pitted against C. K. Davis, W. W. Erwin, and John C. Spooner in felony cases.

And so he came to Superior in 1887, still young and radiant and hopeful, a trained, matured, and skilful man in his profession; a formidable antagonist for any man in any court. Of his life here the profession and the laity know it like a book. He acquired wealth and lost it. This would have crumpled many a man,—it never made a ruffle on FRANK's sunny face.

He was devoted to his city; he toiled for the public civic improvement. He served as a member of the Douglas county board of supervisors; was president of the Commercial club and a normal school regent. He was never fearful of public opinion—in fact, I think he did not at all reckon with it. He was a fair and square dealer. I always think it a wonderful tribute the people of this district paid him when he was a candidate for election as circuit judge. Be it remembered that in practically all the years of his practice his clients were almost entirely corporations, and yet the voters of this region, so largely of the labor and agricultural class, never mentioned the fact of his corporate connections. Sufficient for them, apparently, that the man was FRANK Ross, who by fair and just dealing so long between man and man, whose honest heart was so long open to the public gaze, that the thought of cupidity or favoritism or injustice on his part never seemed to enter the public mind.

And so equipped he went upon the bench, and so he sat, with-

out ostentation, with a quiet dignity and charm, dispensing good, old-fashioned justice, grasping with conscience and intelligence the law problems presented, and with such a kindly grace as to draw the sting from the hard decrees which of course he was in duty bound to enter.

His integrity was most pure, his justice the most inflexible; no motives of interest or consanguinity, of friendship or hatred, being able to bias his decision.

The administration of justice is colored by the magistrate on the bench. Because all earthly magistrates have the infirmities of mortals, the judicial power cannot even approximately distil ideal justice. But blessed be the community and blessed be the bar who can see upon the bench from day to day the magistrate searching for truth in its purity, with unfaltering devotion to Christian ideals, holding high above the storms of forensic battle the named scales, and with unfaltering courage reading righteously and justly the destiny of the litigant.

Well has it been said that an unsullied judiciary is a nation's pride.

The years will come and go; the warring civil strifes will seek adjustment within the court-room's narrow curve; memories will fade and tradition and history will supplant them; but I premise that for long, long years to come in the homes and around the firesides of the community where this unassuming man toiled, wherever and so long as justice is venerated and love finds a home in human hearts, the loving life and work of this silent man will evoke sincere laudation and his toil and sacrifice and the purity of his judicial administration will ever be an inspiration to our profession.

He has now passed across the gloomy chasm to the farther shore to "the Lethean peace of the skies;" but let us hope that in passing there shone upon his judicial vestments celestial sunbeams from the Throne of Grace, and that on his wasted frame and fevered brow he felt "the cooling breath of God's eternal morning."

"Beautiful twilight at set of sun,
Beautiful life with race well run,
Beautiful grave where grasses creep—
Where brown leaves fall—
Where drifts lie deep
O'er worn-out hands.
Ah! beautiful sleep!"

JOHN A. MURPHY,
W. D. DWYER,
R. I. TIPTON,
Committee.

On behalf of the court Mr. Justice VINJE responded as follows:

The memorial just read leaves but little to be said in response thereto except by way of repetition. Judge Ross was in the full bloom of his manhood and law practice in 1891 when I located in Superior. Almost immediately it became apparent to me that he was not only one of the ablest lawyers of that city but also the best liked. His sunny, genial nature that could harbor no malice towards any one was as sunny and genial in the midst of a hotly contested lawsuit as it was at a banquet table, and yet no client of his ever had any right jeopardized thereby. On the contrary, the court and jurors alike felt that in him there was no guile and that his contentions were bottomed upon what he sincerely believed to be justice and law. The result was that it became a pleasure to all connected with court work to have him participate therein. In the fifteen years of his extensive practice before me I can never recall that his even temper was ever ruffled. This kindly, balanced disposition also made him an ideal judge. Always ready to listen to pertinent argument, always courteous, always cheerful, yet dignified, he was able to transact the business of a busy circuit without leaving any scars behind. It was this quality of his that during the last few years of his life made the people and the bar of the Eleventh judicial circuit cheerfully and longingly wait for a physical recovery that seemed almost hopeless. No sacrifice made for FRANK ROSS, as he was familiarly called by all his friends, was too great because it was made for FRANK ROSS. The community was anxious in every way to show its gratitude to him for the service he had rendered it and for the lovable and heroic nature he displayed even in adversity. He suffered severe financial reverses, domestic bereavement, and finally physical affliction; but nothing could mar the sweetness and optimism of his disposition. That throughout all vicissitudes remained the same. And, while intellectually he ranked high in his profession, I am sure the community in which he lived and the bar that practiced with and before him will always remember him as kind-hearted, sunny FRANK ROSS, rather than as the model lawyer and judge. It is given to few men occupying the high places he did to weave themselves into the affections of the community in which they live to the extent he did. His death, therefore, was felt as a distinct personal loss by all who knew him. It was equally a loss to the legal profession and to the state, for he rendered valuable and faithful services to both.

The memorial offered by the Douglas County Bar Association is received and will be entered upon the records of this court.

GEORGE L. WILLIAMS.

On the 13th day of January, 1920, Mr. D. D. Conway of Grand Rapids addressed the court as follows:

May it please the Court:—At the direction of the Wood County Bar Association and the Bar Association of the Seventh Judicial Circuit, I am here to ask leave of your Honors to present this memorial of our departed friend, Judge GEORGE L. WILLIAMS:

Memorial of the Wood County Bar Association and the Bar Association of the Seventh Judicial Circuit.

The career of GEORGE L. WILLIAMS is highly interesting and honorable and well illustrates the opportunities open to all who live in the United States.

GEORGE L. WILLIAMS was born at Homer, Cortland county, New York, May 24, 1848, and died at Grand Rapids, Wisconsin, July 4, 1919.

Until four years old he had as complete use of his arms and legs as any boy ever had. At that time the so-called brain fever and its effects left him crippled in his right side so badly that although his right leg and arm bones grew to the normal length of a six-foot man, yet they were without muscle or strength, and he was obliged to use crutches for over sixty-seven years.

His father, Orren Williams, and his mother, Ann Williams, a brother, sister, and half-brother, came to Whitewater, Wisconsin, in 1855. His father died there a few months later, and his sister also before the winter snow began to fall. His mother, an English lady, taught school and sewed to meet the bills. His brothers and he began to work and go to school and to follow the moves necessarily made by a young Methodist minister, a half-brother with whom his mother and all lived for the next four or five years. The mother later married a farmer, and GEORGE went with her to live on a farm in the town of Bradford, Rock county, remaining there until after the close of the Civil War. During this time he did such farm work as his condition permitted, and read all the town library books kept at his stepfather's house, which included many histories, including Gibbon's "Rise and Fall of the Roman Empire." While thus engaged and while going to district school he was laying deep and broad that foundation upon which to build a structure of judicial strength and acumen for which he was characterized later.

Just at the close of the Civil War, Barnett's "Life of Lincoln" came out and was sold only by subscription. GEORGE L., with an old white horse and an old side-spring buggy, canvassed the Rock county farmers, selling a hundred copies. His brother O. T. had

gone to Milton Academy and was boarding himself and working to pay his way, and thither GEORGE L. went and joined in the venture. His mother baked bread, cake, chickens, meats, etc., and drove the same old horse some eighteen miles once every week or two to bring her boys' cost of living within their means.

At Milton for some three or four months of the first year, under Professor Bond, GEORGE L. practiced Spencerian penmanship three to five hours every day, and acquired the skill and knowledge which was so useful all through his life, and especially available and applicable in that great case of *Brown v. Cohn,* tried at Grand Rapids, in which his cross-examination of Professors Elwell and Toland, two Chicago handwriting experts, won one of his great victories.

The farm of his stepfather, Samuel Harlow, was sold, and his mother and GEORGE L. moved to Appleton, where GEORGE L. entered Lawrence College, graduating in 1874 in the class with Reverend Eugene Updike, D.D., Robert Gamble, United States Senator from South Dakota, and Jacob Sims, a great lawyer of Sioux City, and others. The eminent Reverend John Favill was one of his classmates and intimate friends at Lawrence College and officiated at his funeral. The same year, her husband having died, his mother, the ever-beloved, faithful, efficient, loving mother, went to Madison to keep house for her two boys, then both in the law school of the University of Wisconsin. On account of lack of funds GEORGE quit before finishing and went to Appleton, where he married Edith J. West in October, 1873, and went into the service of the United States as route mail agent, running between Appleton and Manitowoc, and then between New London and Manitowoc for two and one-half years, sleeping at New London upon a bed in a passenger coach, made up from the cushions, during one cold, hard winter. Meanwhile he studied law in Turner & Turner's office during the six hours of the day that the mail car lay over at Manitowoc.

Honorable L. J. Nash, present Revisor of Statutes for Wisconsin, and others were upon the committee when he was examined and admitted to the bar in 1875. Soon after, in 1877, he and family moved to Centralia, now part of Grand Rapids, where he practiced continuously until October, 1899, when he moved to Milwaukee to take up the practice of his brother, O. T. Williams, who had been appointed to the circuit bench. He remained in Milwaukee until October, 1907, when he returned to Grand Rapids, where he practiced law continuously until the time of his death.

He had taught school several terms during college to meet financial needs, and had also been a typesetter on the Green Bay Advocate. When he came here he was elected and took up the duties of county superintendent of schools, and did pioneer work

in our county schools. When the roads were so blocked with snow that travel was impossible, he drove upon the railroad tracks for miles, driving off to miss the trains, in order to get home or to get to some school. He was always ready with practical expedients to *get there.*

His work in the supreme court is covered in the Wisconsin Supreme Court Reports, beginning with the 44th and ending with the 165th, and from the August term, 1878, to April 24, 1917, a period of nearly forty years.

He was also attorney in many famous cases that never reached the supreme court. Among such may be mentioned the Cochran murder trial, tried at Neillsville, Clark county, before the late Judge NEWMAN, in which participated such famous attorneys as Robert J. MacBride, Judge JAMES O'NEILL, the late Judge GEORGE R. GARDNER, the late Judge CATE, the late Judge WEBB, the late Emery A. Storrs, the then greatest criminal lawyer of Chicago, and Judge COTTRILL.

The famous Fenner murder trial, tried in the city of Grand Rapids before the late Judge BENNETT of Janesville, Wisconsin, who later, commenting upon the case, said it was one of the greatest cases of circumstantial evidence that he ever heard, and that GEORGE L. WILLIAMS knew every syllable of it and tried it with the most consummate ability and skill.

The Amherst, Wisconsin, bank robbery case, tried at Stevens Point, wherein GEORGE L. WILLIAMS assisted the district attorney of Portage county in the prosecution, being called in just the night before the trial. In this case his wonderful powers as a cross-examiner were displayed to such an extent as to call forth words of praise and admiration from the defendants, Chicago crooks, who during and after the trial pronounced him a master as compared with the best criminal talent they had in the city of Chicago.

The Hiles slander case, settled during the progress of the trial, which occurred at Janesville, Wisconsin, and the case of *Brown v. Cole*, tried in the city of Grand Rapids on change of venue from Oneida county, lasting twenty-one days, and in which occurred his famous cross-examination of the handwriting experts above mentioned, to wit, Professors Elwell and Toland. As a result of said cross-examination the case was won for the defendant, by whom he was retained.

A lawyer's name and record soon fade and are forgotten, but to indelibly impress the pages of the judicial history of one's state with one's name and views of the law between the leaves of a hundred and twenty volumes of Supreme Court Reports, as lawyer, district attorney, and county judge, is quite a commendable achievement for a modest disciple of Coke on Littleton, and does something toward chiseling his initials in a niche in the temple of Fame.

Because of his physical condition he always labored under a very great handicap. He, however, was a man of great courage, good purpose, and indomitable will, and whenever he found a fault in himself he speedily corrected it in a way never to be forgotten or to be repeated. One incident will suffice to illustrate these qualities: When a young man, on one occasion he traveled by boat from Green Bay to Oconto, where he was engaged to teach a country school located about eighteen miles from that city, and while making this trip on the boat he was inveigled into a little game of cards to pass the time away. The stakes were small, but he soon lost what he had. Arriving at Oconto he had no money with which to hire a conveyance to take him to his school. No doubt he could have borrowed it, but recognizing his fault, and to teach himself a great lesson, he, with his crutch and his cane, over a poor road, on a hot day, walked the entire distance of eighteen miles from Oconto to his school. This lesson impressed itself upon him so strongly that he was ever after unalterably opposed to card playing for money in any amount, and would not allow it in any club or society of which he was a member.

Upon Memory's walls and upon the records that do not fade or grow dim through all the eternal ages there is inscribed of such a one, in letters of light, "Well done, good and faithful;" and "He fought a good fight, and he *kept* the faith."

Grand Rapids, Wisconsin.

D. D. CONWAY,
THEO. W. BRAZEAU,
E. C. PORS,
Wood County Committee.
W. F. OWEN,
JOHN C. HART,
Seventh Circuit Committee.

On behalf of the court Mr. Justice ROSENBERRY responded as follows:

When I came to the bar in 1893 GEORGE L. WILLIAMS was one of the leading lawyers of the Wisconsin River Valley. I did not have the privilege of an intimate personal acquaintance with him.

There was tried at the 1896 November term of the circuit court for Marathon county the case of *State v. Emery and Lord,* before Honorable CHARLES V. BARDEEN, then circuit judge of the Sixteenth circuit, later one of the justices of this court. Mr. WILLIAMS was attorney for Emery, and the late Neal Brown attorney for Lord. It was first tried in Wood county, where the offense, murder in the first degree, was committed, and upon reversal of the judgment of conviction by this court the second trial took place in Marathon county, Honorable B. R. Goggins and Hon.

Geo. R. Gardner appearing for the State. I attended nearly every session of court during the second trial of this celebrated case.

The case presented many interesting features, and afforded an opportunity for the display of Mr. WILLIAMS's peculiar talents as a trial lawyer. Upon the second trial the jury disagreed, and the case was again tried at the November term for 1897. The testimony was voluminous upon each trial. Upon the last trial there was in use a transcript of the evidence taken on the two former trials, which further complicated the situation. Mr. WILLIAMS, leading for the defense, had a most wonderful mastery of the intricate and complex record. Convinced as he was of the innocence of his client, he fought every proposition to the last ditch, and availed himself of every possible defense. His conduct of the trial was vigorous, he marshaled the facts with great skill, and presented the propositions of law involved in a clear and persuasive manner. His physical handicap, limiting him as it did, no doubt had the result of intensifying his efforts in any case to which he really gave himself. He seemed to be utterly absorbed by the task in hand, and I think that this was characteristic of his work during his entire career at the bar. It may be fairly said that he exhausted the cases with which he dealt. His career at the bar was a long and honorable one. His industry, his perseverance, his thoroughness in preparation for trial, his unimpeachable integrity both in the court room and out of it, made him an exemplary and distinguished lawyer.

The memorial will be received and made a part of the records of this court.

GEORGE W. CATE.

Judge BYRON B. PARK of Stevens Point then addressed the court:

May it please the Court:—The undersigned committee, appointed by the Bar Association of the Seventh Judicial Circuit, present to the court the following memorial of Honorable GEORGE W. CATE, a member of the bar of this court, who died at Stevens Point, Wisconsin, on March 7, 1905:

Memorial of the Bar Association of the Seventh Judicial Circuit.

Judge GEORGE W. CATE was born September 17, 1824, at the town of Montpelier, Vermont. His ancestors were soldiers in the War of 1812 and in the War of the Revolution.

He was educated in the common schools and in a local private school. At the age of seventeen he became a school teacher, and taught during the winter months for several years. In 1840 he

began the study of law in the office of Joseph A. Wing at Plainfield, Vermont, where he remained three years, followed by a year in the office of H. Lucius B. Peck, then a leading lawyer in Central Vermont.

He was admitted to the bar in September, 1845. Writing of his admission Judge CATE said: "I was admitted to the bar in Montpelier, Vermont, before Judge ISAAC F. REDFIELD, after being critically examined as to my qualifications." Continuing, he writes: "During that year I attempted to practice in the little village about my home, but it was uphill business. I soon learned that legal business of any magnitude or worth doing was controlled by the old established lawyers, who not only wanted it but were able to keep it. So in the spring of 1846 I determined to go West."

He arrived at Mineral Point, Wisconsin, in the fall of 1846, without money, and took a two months' job of cutting cord wood at five shillings a cord and board himself. When this job was ended, he writes, "I hired out to Abraham Brawley, a lumberman making his headquarters at a little hamlet called Stevens Point, nearly 200 miles up on the Wisconsin river." He drove a team of four oxen and a Hoosier wagon with supplies from Mineral Point to Stevens Point, camping out nights. He then worked the next two years in the woods, in sawmills, and running lumber from the pineries to St. Louis.

On January 1, 1848, he opened a law office at Plover, then the county seat of Portage county. Portage county then embraced the present county of Adams, the western half of Waushara, and the present counties of Wood, Portage, Marathon, and Lincoln. Judge CATE says: "Considerable legal business and plenty of offices came to me." In 1848 he became deputy postmaster at Plover, deputy register of deeds, and deputy clerk of the board of supervisors. In 1849 he was elected district attorney and held the office two terms. He was also elected and served as register of deeds and county clerk, and was several times chairman of the county board of supervisors.

In the fall of 1851 he was elected to the Assembly and was re-elected the next year. In the session of the legislature during his second term Judge CATE was chairman of the Judiciary committee and one of the managers of the impeachment trial of Judge HUBBELL. In 1850 he formed a partnership with the late Chauncey Abbott of Madison, under the name of Abbott & Cate. The partnership was located at Plover. In 1852, also at Plover, he became the partner of Luther Hanchett, which partnership continued as Cate & Hanchett until in April, 1854, when Mr. CATE was elected judge of the Seventh judicial circuit. He was the first judge of that circuit. He was re-elected three times, and held

that office until he resigned to take a seat in the Forty-fourth Congress, to which he had been elected at the general election in November, 1874.

It was this Congress that created the electoral commission to determine whether Mr. Hayes or Mr. Tilden had been elected President of the United States. Judge CATE vehemently opposed the passage of the bill creating the commission. He writes: "When the vote on the passage of the bill was taken I voted 'No' with sixteen others. I have always taken pride in that vote from the fact, now apparent, that it created, as I then predicted it would, a purely partisan eight-to-seven machine."

Judge CATE served but one term in Congress. In the summer of 1875 he opened an office in Stevens Point. At the expiration of his term in Congress commenced his splendid career as one of the greatest trial lawyers the state has produced. He at once became the foremost trial lawyer of his old circuit, which then embraced ten counties. He speedily gained a state-wide reputation as a lawyer of pre-eminent ability. From 1877 until his practical retirement a year or two before his death, he was constantly engaged in arduous work with a large and wealthy clientele, drawn to him from all over Central and Northern Wisconsin. No lawyer in the state, it is safe to say, had a larger personal following of people who invariably turned to him for counsel, advice, and for trial work.

From 1876 to 1886 he had no partner to assist him. In 1886 there was formed the firm of Cate, Jones & Sanborn, which continued until the 1st day of January, 1896, when the firm of Cate, Sanborn, Lamoreux & Park was organized. Mr. A. W. Sanborn withdrew from this firm in 1900, and in 1902 Judge CATE withdrew and united with his son-in-law, G. M. Dahl, with whom he continued to be associated until his death. All of these partnerships were located at Stevens Point.

Judge CATE's name first appears in the Wisconsin Reports as an attorney in Volume 41. It last appears in Volume 123. In nearly if not in every volume from the 41st to the 123d, inclusive, his name will be found, either individually or with the firm of which he was at the time a member. He evaded as fully as he could arguing his cases in the supreme court. He was content to submit his cases on brief or that his associates should appear and present them. But always he kept in close touch with the work of preparing the briefs and in arranging and advising as to the points to be presented and relied upon. Though his name appears in Volume 41, the first case he argued in this court was *Dorsey v. Phillips & Colby Construction Company*, 42 Wis. 583, in which he was attorney for the plaintiff and respondent, and ex-Chief Justice LUTHER S. DIXON was for the defendant and appellant. EDWARD

G. RYAN was Chief Justice. While he was then attending court Judge CATE met and conversed with Justice RYAN. It was their first meeting since their intimate association during the Hubbell impeachment.

Judge CATE was an exceptionally striking and fine appearing man. He was five feet eleven inches tall and finely developed. He had a quick, active, well trained mind; a powerful but well modulated voice; which with his attractive, strong, intellectual face made him an unusually forceful and persuasive public speaker. All his life he was an indefatigable worker and a man of tremendous energy. He never could be induced or persuaded to take a vacation. His pleasure was in the constant study of the law and the multitudinous problems presented by his clients. One of his chief characteristics as a lawyer was his complete and absolute devotion to his client and his client's cause. Aside from his great mental capacity, his most universally recognized characteristic was his absolute integrity.

Those who came to know him socially and in his home life found him to be an exceptionally lovable man. He was generous, kind-hearted, and very companionable. His mind was stored with the events of his long, varied, and useful career, and it was a rare pleasure to listen to his reminiscences. Mr. Reuben G. Thwaites urged him to write them or to allow them to be written up, but this he steadfastly refused to do, very greatly to the regret of all whose good fortune it was ever to be present when he could be persuaded to talk of his experiences.

Judge CATE was married October 24, 1850, to Levara S. Brown, who died August 29, 1915. Six children survive him. He was a great man and always a gentleman; a pioneer in Central and Northern Wisconsin, where the imprint of his personality will long be seen and felt by people in nearly every walk of life.

Dated December 1, 1919.

BYRON B. PARK.
THEO. W. BRAZEAU.
EDWARD F. KILEEN.

GILBERT L. PARK.

Mr. Geo. B. Nelson of Stevens Point then addressed the court:

May it please the Court:—The committee appointed by the Seventh Judicial Circuit Bar Association hereby presents to the court the following memorial of the life and service of Judge GILBERT L. PARK, who died at the city of Waukesha, Wisconsin, on the 5th day of June, 1884:

Memorial of the Bar Association of the Seventh Judicial Circuit.

Over thirty-five years have elapsed since GILBERT L. PARK laid down his burdens and passed beyond Eternity's veil. The thought that no memorial has heretofore been presented to this court and spread upon its records produces in the hearts and minds of the members of the bar of Central Wisconsin only feelings of shame and humiliation. The committee now hopes to do that which lovingly should have been done years ago by those whose lives intimately touched that of Judge PARK.

GILBERT L. PARK was born on the 31st day of August, 1824, in Scipio, Cayuga county, in the state of New York, a son of Elisha and Sarah (McDowell) Park. His grandfather, Joel Park, served in the Revolutionary War and was a member of the expedition which accomplished the capture of General Burgoyne and his army. Young GILBERT was brought up on his father's farm and attended school about half of the time. Of his early life little is known except that he yearned for knowledge and longed for adventure. At the age of fifteen, without formal leave-taking, he left home and enlisted in the service of the Hudson Bay Company. The service in this company took him up the Ottowa river to Hudson Bay and as far north as Fort Churchill. A year of this service seems to have satisfied his longing for adventure, for he shortly after returned to Port Dover, Ontario, whither his father's family had removed. For the three years following he attended an academy at Millville, Orleans county, New York. He then returned to Canada, and for about two years engaged in the lumber business, until a severe storm on Lake Erie in 1848 completely shattered a large raft of his lumber, substantially his all, and incidentally shattered his career as a lumberman. This apparent misfortune turned abruptly the course of his life and assured him to the legal profession. He turned to Kalamazoo and to the law office of N. A. Balch, where he pursued his studies until September, 1851, when he was admitted to the bar.

The following November he came to Wisconsin to embark upon his chosen profession, but stern necessity compelled him tempo-

rarily to engage in the cutting of saw logs and running the Wisconsin river—a hard experience, but one which in later years stood him well in understanding and dealing with the peculiar problems of the pinery days of Northern Wisconsin.

In September, 1852, he formed a copartnership with James T. Alban at Plover, Wisconsin, the then primitive county seat of Portage county. Four years this partnership continued, when PARK removed to the rapidly growing town of Stevens Point, five miles up the river. In 1854 he was elected district attorney of Portage county, and two years later felt himself sufficiently established in the practice of the law to warrant his marriage to Mary D. Beach of Kalamazoo, Michigan. He was re-elected district attorney in the fall of that year, and rapidly developed into a lawyer whose services and counsel were ever more and more in demand.

At the outbreak of the Civil War, although mayor of Stevens Point, he resigned and entered the service as adjutant of the Eighteenth Wisconsin Volunteer Infantry. For three and one-half years he was continuously with his regiment, participating in many engagements and famous battles of the war. He was at Shiloh, Lookout Mountain, the siege of Vicksburg, and with Sherman on his march to the sea. Although never wounded, he had several narrow escapes. At one time his horse was shot under him, and at another time a bullet struck and shattered the scabbard of his sheathed sword. During the war he became captain of Company G of his regiment, and was mustered out in 1865.

He lost no time in returning to Stevens Point, where he began assiduously to devote himself to his profession, and for the next ten or eleven years continuously grew as a lawyer, and his practice became large and remunerative. The court records of those years show that in his county he was either attorney or of counsel in almost every important case tried.

On the 1st of March, 1875, he was appointed circuit judge by Governor Taylor, to succeed Judge GEORGE W. CATE, resigned. In the April following he was elected for the remainder of the unexpired term, and in 1878 re-elected for a full term. After several years of service on the bench ill health became his lot, and on the 13th day of March, 1883, he sat upon the bench for the last time, and shortly thereafter resigned. He hoped to regain his health by a complete rest and a change of climate. He spent some time in the state of California and in Washington Territory, with little benefit to his health. He returned to Wisconsin and entered a sanatorium at Waukesha, where on the 5th day of June, 1884, without warning of impending doom, he passed to the great beyond.

In this day and age it is indeed difficult to appreciate the full measure of his popularity. It seems to be the unanimous opinion of all living survivors of Judge PARK'S time that he could count

more warm personal friends than any other man who lived in Northern Wisconsin in his day.

Judge PARK was not only a strong lawyer, but he was an unusual student of the world's best literature and history. He was an able speaker, who was often called upon for both formal and informal addresses. Several of his prepared addresses published in the newspapers of those times prove him to have been a master of the English language and rich in the knowledge of the world's literature and history.

He was a politician, using that term in its highest and best sense. During the early sixties he was a vigorous War Democrat, and continued throughout his life to be a strong exponent of Democratic faith. He was twice nominated by his party for the State Senate, once for Lieutenant Governor, and on two other occasions for Representative in Congress. His interest in public affairs, and especially in the development of education and public libraries, was well defined.

As a judge he was able, honest, and impartial, genial yet dignified. He disposed of long calendars with system and dispatch.

As a man in his home and in the every-day walks of life he was unusually genial and friendly. He loved children, the young, the middle aged, and the old. He was peculiarly democratic in his tastes, and the rich and the poor all felt the spell of his charming personality.

As a citizen he was intensely patriotic. He loved America and her institutions. He often proudly recounted to his audiences in eloquent language the ideals and the institutions which were peculiarly American, and as often exhorted his auditors to be true to American ideals.

He loved nature, and found joy in the beauties of grass and flower and tree.

His old home, though modest in appointment, was the abode of charming hospitality. His new and modern home, built with the hope that he might live to dwell therein, a hope which he never realized, was planned, not for the purpose of satisfying the selfish wishes of its owner and his family alone, but as a center of bright and happy hospitality.

It was not strange, therefore, that the news of the death of Judge PARK brought instant and profound grief to the hearts of all who knew him. The death of no other man of his time in Northern Wisconsin summoned together so large a number of loyal, grieving friends.

He was an able lawyer, an excellent judge, a good friend, and a loyal American. While his life might have been longer, no one can say that it was not rich in accomplishment, benign in its influence, and worthy of emulation.

GEO. B. NELSON.
L. D. SMITH.
C. O. BAKER.

CHARLES M. WEBB.

Mr. B. R. Goggins of Grand Rapids then addressed the court:

May it please the Court:—The undersigned committee, appointed by the Bar Association of the Seventh Judicial Circuit, presents to the court the following memorial of the Honorable CHARLES M. WEBB, late judge of the Seventh Judicial Circuit of Wisconsin:

Memorial of the Bar Association of the Seventh Judicial Circuit.

CHARLES M. WEBB was born December 30, 1833, at Towanda, Pennsylvania, and died at his home in Grand Rapids, Wisconsin, August 12, 1911. He was of prominent Revolutionary stock, and the youngest of five children—four sons and one daughter. At the age of twelve years he left school and worked as a typesetter in a printing office at Troy, and later at Wellsboro, Pennsylvania, and, after one and one-half years as a student at West Point Military Academy, worked in the government printing office at Washington for three years. During these three years he heard a number of the great debates in Congress which preceded the War of the Rebellion, and to him many of the great statesmen and politicians of that day were familiar figures. This environment stimulated his natural ambition to become a lawyer. Accordingly he returned home and studied law in the office of the leading lawyer of his home city, and was admitted to the bar in 1857. The same year he married Miss Jane Pierce of Smithville, Pennsylvania, who survived him to June 1, 1914. From this union there were three daughters, two of whom yet survive.

His brothers William and Henry were noted early-day lawyers and politicians of Wisconsin and later of Kansas, where William was successively circuit judge, clerk of the supreme court, and author of a complete revision of the Kansas Statutes of very high merit.

In the "march of empire" westward, he, with his wife, followed his brothers to Wisconsin, arriving at Wautoma, Waushara county, in 1857. He first held a clerkship in the Wisconsin legislature, of which his brother William was then a member. Next he moved to Plover, the then county seat of Portage county, and formed a law partnership with the late Judge ALBAN, but shortly moved to Grand Rapids in April, 1858, which continued to be his residence until the time of his death. There he was first the law partner of the late Jere D. Witter for about four years, and then formed a law partnership with the late J. W. Cochran, under the name Webb & Cochran, which continued to his elevation to the circuit bench.

Charles M. Webb.

During the first year of his residence in Grand Rapids he was elected district attorney for Wood county, which office he resigned in 1861 to enter the army as first lieutenant of Company G, Twelfth Wisconsin Infantry, where he continued for eight months. He resigned and returned home and resumed law practice. For two terms, commencing in 1864, he was clerk of the board of supervisors of Wood county. In 1868 he was elected to the State Senate. He was the first United States district attorney for the Western district of Wisconsin, serving from July, 1870, to February 14, 1878, when he resigned. In 1881 he was appointed register of the United States land office at Deadwood, now in South Dakota, which position he resigned after a few months' service and resumed his law practice at Grand Rapids, and again entered the State Senate for a second term. His elevation to the circuit bench in 1883 as successor to the late Judge G. L. PARK followed. He was successively elected and re-elected to this high office without opposition, serving without a break to the time of his death—nearly twenty-eight years. He was the choice of the bar of the state for justice of the Wisconsin supreme court in the election of 1893. He was, however, defeated by the late Justice NEWMAN, who was carried to victory by his very popular decision as circuit judge in the Treasury Cases. Subsequently he twice refused appointment to the Wisconsin supreme court. He was once a prominent Republican candidate for Congress, and later and in 1898 and again in 1905 was a very prominent Republican candidate for United States Senator.

As a trial lawyer and counselor he ranked high. He took a great interest in remedial legislation, and it was largely due to his labors, while a member of the State Senate, that our present legislation on reassessment of taxes was enacted, thereby correcting the disastrous effects to Central and Northern Wisconsin of the decisions in *Marsh v. Supervisors*, 42 Wis., and other similar cases.

But it was as judge that he took highest rank. He had a great and legal mind. He boasted little memory of decisions by title, volume, or page, but fully comprehended the nature of our government, and had a most thorough understanding of the fundamental principles of our jurisprudence. No judge more effectively applied these principles—a fact upon which rests much of his judicial renown. He was partisan in politics and of strong likes and violent dislikes of both men and measures, and his prejudices were sometimes considered violent and unreasonable. He was reared to full manhood in an era when strong men almost necessarily were intensely partisan. Yet upon the bench he was free from all such influences and considerations. Neither had he that pride of personal opinion or that undue regard for passing popular whims which sometimes warps proper judicial temperament. It was once said

by the United States supreme court that "Judges sometimes surrender, with reluctance, a favorite opinion, even when it meets condemnation at every turn, and find it well nigh impossible to change it at all when it happens to harmonize with the popular voice or is gilded by the rays of successful experiment."

Judge WEBB was not of this class. He possessed the rare faculty of unerringly distinguishing truth from falsehood, and was not hampered by the legal phraseology of books. He gave expression to the law in his own words, and made every case tried before him one of individual, living vital interest. He conducted his court with freedom and ease and at the same time with due dignity. As a judge he approached the ideal as near as can be expected of the human.

So great was his reputation as a jurist, early in his judicial career established, that many important causes were by mutual consent of the interested parties transferred to his circuit for trial by him, and it is to be regretted that, during the later years of his life particularly, he was too seriously taxed in this respect.

His circuit at one time comprised practically the whole of the Wisconsin River Valley north of Adams county, and he was known as familiarly and favorably in the cities of Wausau and Merrill as in the present Seventh judicial circuit. He loved "the boys," as he called the lawyers who practiced before him, and one of the last expressed wishes of his life was that he might meet them all once more.

He was of a splendid type of citizenship. He had the highest faith in his state and in this nation, and believed in their future prosperity and stability. He prized the friendship of his neighbors and they prized his. He was democratic in his tastes and in his conduct, was of the highest integrity, and was one of the most genial and companionable of men. He lived in an era of brilliant men of the pioneer type and had intimate association with many of them. He was a fountain of interesting reminiscence, and as a conversationalist had few, if any, superiors. The good influence of his life will never perish.

Dated December 1, 1919.

B. R. GOGGINS.
E. C. PORS.
WM. E. FISHER.

Mr. Chief Justice WINSLOW responded:

The Seventh judicial circuit has indeed had a remarkable history. From the time of its organization in 1854 until the death of Judge WEBB in 1911, a period of more than fifty-seven years, it had but three judges. No other circuit, I am sure, can show a record approaching this. These three judges were all strong men,

good lawyers, eminent citizens, men who had successfully met toil and adverse circumstances, and men who possessed and were entitled to possess the fullest confidence and respect of their fellow-men. While their memorials have been long delayed, there is after all a certain fitness in their being presented at the same time, for the men were contemporaries and their careers were closely linked together by their successive occupancy of the same bench.

One of them, Judge CATE, may with entire truth be called one of the fathers of the state. He came to Wisconsin about three years before the state government was organized, and while still a very young man took a leading part in some of the most important of the political struggles of the early fifties. Judge PARK came a few years later, and, when the great Civil War threatened to destroy the nation, he closed his law office, bade good-bye to ease and comfort and civil preferment, joined that great army of generous and patriotic youth which flowed steadily southward, and gave almost four of the very best years of his life to the service of his country. Doubtless the hardships and privations of those years seriously undermined his constitution and contributed to bring about the illness which compelled his resignation from the bench after eight years of brilliant service.

Judge WEBB also served his country in the Civil War and had a political career of no inconsiderable proportions, but the great work of his life was on the circuit bench, where for nearly three decades he presided in an extensive circuit which did a very large proportion of the litigated business of the Northern Central part of Wisconsin during the years when that business was at its height.

Judge CATE's career was in some respects the most remarkable of the three. Admitted to the bar at twenty-one, a lumberjack at twenty-four, district attorney at twenty-six, member of the Assembly of the state and chairman of the Judiciary committee of that body at twenty-eight, conducting one of the most famous impeachment trials ever held in any state at twenty-nine, and circuit judge at thirty! Few men have ever crowded so much into a single decade. His career was remarkable also in this, namely, that his long judicial service of nearly a score of years preceded his remarkable career of thirty years as a trial lawyer. Judge CATE argued a number of cases after I came to this bench and I can see him now as plainly as though it were yesterday. No one having once seen it could ever forget that calm, strong, classic countenance like the countenance of a Roman senator. He wasted no time on immaterial or trivial matters, but proceeded at once to the decisive questions of his case and discussed them forcibly and clearly like the great advocate that he was. I use the word "advocate" advisedly, for he was greater as an advocate than he was as a lawyer. I can well imagine his strength as a trial lawyer and

the implicit confidence which he must have inspired in his clientage. He could not help being a leader, for the qualities of leadership were his by birthright. His life was long, eventful, and well rounded. As the memorial well says, his was a great personality whose imprint will long be apparent in Central and Northern Wisconsin.

For some reasons it is to be regretted that the memorial to Judge PARK has been so long delayed. He died thirty-five years ago, and there are few left now who can speak of his character and abilities from that intimate knowledge which personal acquaintance alone can give. I regret that I never had the good fortune to meet him personally. The unanimous testimony of his contemporaries, however, does not permit us to question in the slightest his character or his eminence as a lawyer, a patriot, a judge, and a great-minded citizen. Like many another young lawyer of the period, he dropped a recently established practice at his country's call and spent several years in the field, and such a hiatus in a lawyer's practice is not readily made up. Judge PARK, however, stepped back at once into his practice as though there had been no break. His army experiences had evidently widened his horizon and matured his powers. They had added to, rather than detracted from, his strength as a lawyer and an advocate. They had also added to his prestige, and the memorial is undoubtedly correct in its appraisement of his popularity with the people of Northern Central Wisconsin, a popularity not based on the arts of the demagogue but on character and solid merit. It was almost inevitable that he should be chosen to succeed Judge CATE upon the latter's retirement, and it was quite as inevitable that he should make an able and successful judge. His early death must always be regretted, for it prevented that full rounding out of a long judicial career which would surely have been his; but short though that career was, it may truly be said to have been complete, for it fully demonstrated his eminent fitness for the bench.

All of the three men were natural politicians, I think, in the better sense; they all enjoyed the excitement of political conflicts as well as the approval of their fellow citizens expressed at the polls, but Judge WEBB perhaps retained his political zest the longest. His active candidacy for the United States Senate during his service on the circuit bench is very conclusive proof that the joy of the political battle still remained with him. His defeat for this office was in my judgment fortunate rather than otherwise. It insured him that long career on the trial bench on which his claim to a high place among the great figures of the state must always rest. During the twenty-eight years which he spent on the bench his large circuit included a great portion of the forest area of the state whose untold wealth was still being exploited by the lumber-

man, and his calendars were crowded with cases involving complicated logging contracts, disputed boundaries and titles, and alleged illegal and unjust taxation, forming a great mass of litigation vastly important in its financial aspects and teeming with new and intricate legal questions. The test was severe, but it was met with complete success as the records of this court show. Endowed with a clear and analytical mind, a great fund of common sense, a facility for dispatching business, and a sound legal education, he brought to his task the large understanding and sure grasp of the trained lawyer who has also graduated from the school of practical experience. During those years he rendered conspicuously able and useful service to the state, and it is fitting that due appreciation of that service be made a matter of public record here.

The memorials and responses will be filed and published in the Reports.

CASES DETERMINED

AT THE

August Term, 1919.

WAGENER, Respondent, vs. OLD COLONY LIFE INSURANCE COMPANY, Appellant.

April 29—November 4, 1919.

Insurance: First premium: Time of payment: Payment of premium by note: Evidence: Implied waiver: Request for payment of premium.

1. The taking of a promissory note, either for a preceding liability or a debt incurred at the time, is not payment unless expressly agreed to by both parties.
2. Credit for the first premium due on a life insurance policy may be extended to an insured, and may be shown by the facts and circumstances under which the application for insurance and delivery of the policy was carried out and the general course of business as conducted by the insurance company through its agent.
3. A note given for a premium does not operate as a payment in the absence of an express agreement to that effect.
4. The evidence in this case is *held* insufficient to show that the note of the insured, payable to the local agent of the insurer, was given and accepted as payment of the first annual premium on the insured's life policy.
5. A recital in a life insurance application that the first annual premium, immediately due, had been paid in cash, has no evidentiary weight on the issue as to whether insured's note was payment, where concededly no such cash payment was made.
6. A letter of the general agent of the insurer to the insured, dated September 24th, calling the insured's attention to the fact that his first premium was due September 9th and asking him to give the matter his immediate attention if the premium had not already been paid, is not binding as a declaration that the policy was then in force, being but a friendly admonition to the insured.

KERWIN and ESCHWEILER, JJ., dissent.

APPEAL from a judgment of the circuit court for Door county: EDGAR V. WERNER, Judge. *Reversed.*

This action was brought by *May E. Wagener,* widow of Dr. Nicholas Z. Wagener, to recover the amount of an insurance policy which she claims was issued to her husband by the defendant and was in force at the time of his death.

On April 9, 1914, Dr. Wagener signed a written application to the defendant for a policy insuring his life for the sum of $5,000, his wife being named as beneficiary. The annual premium was to be $85.50. Dr. Wagener preferred to have the annual premium due six months thereafter, so he and the agent, George C. Hocks, agreed that Dr. Wagener was to apply for the ten-year term and for six-months term insurance. Wagener signed a written application requesting this $5,000 policy for a ten-year term, but stated nothing therein as to the six-months term insurance. Hocks mailed this application to the company at Chicago. Wagener gave Hocks the following note:

"$85.50. Sturgeon Bay, Wis., April 9, 1914.

"Six months after date I promise to pay to the order of George Hocks or order, eighty-five and 50-100 dollars at Sturgeon Bay, Wisconsin. Value received, with interest at 6 % per annum.

"No. ——. Due, ——. N. Z. WAGENER."

The following day Hocks went to Green Bay, where he met Waldman, the general agent of the company, for whom he acted as local agent, and apprised him of Wagener's application and of the fact that it had been sent to the company at Chicago. Hocks reported that he had collected but $6.08 for the six-months term insurance. Waldman pointed out that Hocks had made a mistake in his figures as to the rate on the short-term insurance, so Hocks called Dr. Wagener up on the phone, telling him what the correct rate on the term insurance was, and the doctor agreed to pay the difference, $23.09, which sum he later paid. Hocks did nothing further in negotiating the insurance. He told Wald-

man he had the above note of Wagener, delivered other notes connected with his agency business to Waldman and closed up his agency business, but retained Wagener's note. He immediately went West, taking Wagener's note with him. About April 25th Waldman received from the company a ten-year policy which the company issued on the application signed by Wagener, which Hocks had mailed, containing no terms asking for short-term insurance. Waldman, without consulting Wagener, interlined the provisions of the application by inserting a request that the policy be dated September 9, 1914, and requested that a policy be issued in accordance with this request and that the company send a policy complying with such application and issue a short-term insurance up to September 9, 1914.

The policy was sent to Dr. Wagener and had attached thereto an agreement for short-term insurance up to September 9, 1914, upon payment of $29.89. The following paper was sent by the company to Dr. Wagener with the request that he execute it:

"I, Nicholas Z. Wagener, of Sturgeon Bay, Wisconsin, the insured under policy No. 12291, issued by the *Old Colony Life Insurance Company,* Chicago, Illinois, do hereby agree in behalf of myself, my heirs, executors, administrators, or assigns, that in event I fail to pay the annual premium, amounting to $85.50, due upon policy No. 12291, on September 9, 1914, issued by the *Old Colony Life Insurance Company* upon my life, bearing the date of September 9, 1914, that I will deliver back to said company said policy, and that all my rights of whatsoever character shall thereupon cease."

This paper, dated May 14, 1914, was signed by Dr. Wagener and returned to the company.

On September 24, 1914, when Dr. Wagener was ill in the hospital, Waldman, the general agent, wrote the doctor the following letter:

"My dear Sir:

"The annual premium (first year) of $85.50 on your

$5,000 ten-year term policy was due on the 9th of this month. Have you paid the same as yet? If not, kindly give this matter your early attention. Hoping all is well and that you have fully recovered from the effects of your operation, I remain, with kindest regards,

"Yours very truly, H. C. WALDMAN."

Dr. Wagener died October 3, 1914. The six-months note he had given Hocks, the local agent, became due October 9, 1914. No premium had been paid to the company either by Hocks or the doctor on or before September 9, 1914, as called for by the terms of the policy and the writing executed by Wagener on May 14, 1914.

After the death of Dr. Wagener, payment of the premium was tendered to Waldman by friends of the deceased, which tenders were refused by Waldman. The plaintiff applied for blanks on which to make proof of death and for payment of the amount of the policy, but the company refused to send them or to pay the amount of the policy.

The case was tried before the court and a jury. The jury found by a special verdict that the defendant company extended credit to the deceased for the first premium due September 9, 1914, on the insurance policy in question, in its general course of business as conducted by said company through its agent, and that the defendant had knowledge through its agent of the condition of the health of Dr. Wagener a reasonable length of time before his death, October 3, 1914, to have demanded a return of the policy in question.

Judgment was entered in favor of the plaintiff for $5,000 and for interest and costs. This is an appeal from such judgment.

For the appellant there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

W. E. Wagener of Sturgeon Bay, for the respondent.

The following opinions were filed May 27, 1919:

SIEBECKER, J. The defendant contends that there is no evidence in the case sustaining the finding of the jury to the effect that the defendant extended credit to Nicholas Z. Wagener for the first premium, due September 9, 1914, on the insurance policy in question. The plaintiff asserts that such credit was extended to Wagener by acceptance of his note by the agent, Hocks, under the facts and circumstances shown by the evidence. It is an accepted and well established rule of law in this state that the taking of a promissory note, either for a preceding liability or a debt incurred at the time, is not payment unless expressly agreed to by both parties. *Aultman & Co. v. Jett,* 42 Wis. 488; *Ford v. Mitchell,* 15 Wis. 304; *Paine v. Voorhees,* 26 Wis. 522; *Willow River L. Co. v. Luger F. Co.* 102 Wis. 636, 78 N. W. 762.

Credit for the first premium due on a life insurance policy may be extended to an insured, and may be shown by the facts and circumstances under which the application for insurance and delivery of the policy was carried out and the general course of business as conducted by the insurance company through its agent. *Hartwig v. Ætna L. Ins. Co.* 164 Wis. 20, 158 N. W. 280.

A note given for a premium does not operate as a payment in the absence of an express agreement to that effect. *Kinne v. Mich. Mut. L. Ins. Co.* 92 Wis. 335, 66 N. W. 359; *McDonald v. Provident S. L. Assur. Soc.* 108 Wis. 213, 84 N. W. 154.

The question arises, Do the facts and circumstances shown by the evidence in this case permit of the inference that it was agreed by Wagener and the local agent, Hocks, that the note of Wagener, payable to Hocks, was given and accepted as a payment of the first annual premium, due September 9, 1914, on the policy in question, or that the

company extended Wagener credit for the payment of the premium? A search of the record fails to disclose any evidence tending to show that the note in question was given and accepted in payment of the premium due on this policy on September 9, 1914. We are not confined to oral statements of the agent, Hocks, for determination of this question. Aside from Hocks's testimony we have the evidence of the transactions pertaining to the application and delivery of the policy in so far as the general agent, Waldman, acted in the matter, and the writings signed by Wagener, which throw light on the subject. True, the application recites that the premium of $85.50 immediately due under the application as originally submitted to the defendant on a term policy for ten years had been paid in cash, but concededly no such cash payment was made, hence such recital has no evidentiary weight on the issue presented. The policy provides that the policy was not "to take effect until the first premium thereon shall have been actually paid in cash, during the lifetime and good health of the insured." This provision must be viewed in the light of the whole transaction, including the preliminary term insurance from the time it was issued to September 9, 1914. Without question Wagener paid and defendant accepted the $29.89 as payment of the premium of the preliminary term insurance and this insurance was in effect for that period. The policy as delivered contained the condition that the ten-year term insurance was to begin September 9, 1914, and that premiums were to be paid annually in advance, and "if any premium . . . or note therefor or any indebtedness secured by this policy shall not be paid when due, this policy shall thereupon cease."

As shown by the foregoing statement, Wagener, on May 14, 1914, at the request of the insurance company, signed and delivered to defendant the writing whereby he agreed, for himself and his legal representatives, that in event he

failed to pay the first annual premium on the ten-year term policy on September 9, 1914, to deliver back such policy and that all his rights under the policy should cease. The significance of this act by Wagener tends directly to show that he understood that payment of this premium was to be made as specified in the policy, namely, in cash on September 9th, and negatives the idea that he had an arrangement with Hocks by which he was to have an extension of credit up to October 9th following. The testimony of Waldman, the general agent, is clearly to the effect that he made no arrangement, nor did he understand that Hocks had made one, for an extension of credit of the payment of the premium on September 9th. As we have above indicated, the note is not in law evidence in itself that it was accepted as payment of the premium due September 9th. The course of conducting this business by the insurance company and by Wagener subsequent to his dealing with Hocks tends to show that no credit was extended.

Does the evidence of Hocks permit of an inference that the note was given and accepted by him as payment of the premium due September 9, 1914, or that it was taken as part of an arrangement to extend credit for the first premium? It is to be noted that the note and original application bear the same date, April 9,1914; that the original application is for a ten-year term policy, to become effective immediately upon delivery; that the note is not made payable to the insurance company, but is payable to Hocks individually; that he held and treated it as an individual note and did not claim after Wagener's death that it was the company's note; that on October 9th, when it became due, he treated it as his individual note, and that on October 9th he offered to pay defendant $60 in cash on the premium of $85.50, which under the terms of the policy became due on September 9th. True, Hocks testifies that he took the note to cover a year's premium, but explains that payment of the first premium

was to be made in cash, and if Wagener could not pay it he (Hocks) would pay it for him; that he thought Wagener would pay Waldman and leave him out of it; that he accepted Wagener's note as a personal matter between him and Wagener. He also testified that he had property dealings with Wagener and held other notes from him. It is shown beyond dispute by the testimony of Hocks that he and Wagener had a private arrangement to the effect that the first premium on the policy was to be paid in cash when due, and that in the event Wagener could not pay it Hocks would pay it for him, and that the note in question was given to Hocks individually. It is therefore clear that there is no evidence in the case tending to show that the insurance company, through its agent, accepted the note as payment of the premium nor extended credit to Wagener for payment of the premium due September 9, 1914, and that there is no basis in the evidence supporting the finding of the jury that the company extended credit to Wagener for the first premium. *Tomsecek v. Travelers' Ins. Co.* 113 Wis. 114, 88 N. W. 1013; *McDonald v. Provident S. L. Assur. Soc.* 108 Wis. 213, 84 N. W. 154.

It follows that the court erred in refusing to direct a verdict on this issue in the defendant's favor. It necessarily follows that under the terms of the policy it was not in force and operative from September 9, 1914, by reason of the default in payment of the first annual premium due on that date. There is no ground for the claim that the letter of Waldman to Wagener dated September 24, 1914, calling to his attention the fact that the first premium was due September 9th, and asking him to give the matter his immediate attention if the premium had not already been paid, is binding as a declaration that the policy was then in force. The letter, as Waldman testifies, was sent as a friendly admonition to Wagener. Its contents do not indicate that the policy was treated as in force, nor do they constitute a

waiver of the condition that the policy was not to be effective if the premium due on September 9, 1914, was not paid as specified in the policy. The trial court erred in holding that the evidence in the case presented an issue of fact for determination by a jury and in awarding a judgment in plaintiff's favor for recovery on the policy.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction to award judgment dismissing the plaintiff's complaint.

KERWIN, J. (*dissenting*). The jury found (1) that the defendant company extended credit to the deceased, Nicholas Z. Wagener, for the first premium due September 9, 1914, on the insurance policy in question in its general course of business as conducted by said company through its agent; (2) that the defendant company, by and through its agent, had knowledge of the condition of the health of deceased, Nicholas Z. Wagener, a reasonable length of time prior to his death, October 3, 1914, to have demanded a return of the policy in question.

These findings are supported by the evidence, and upon the findings of the jury and the evidence in the case I am convinced that the judgment below is right and should be affirmed. *Rasmusen v. New York L. Ins. Co.* 91 Wis. 81 (64 N. W. 301), at p. 87; *Hartwig v. Ætna L. Ins. Co.* 164 Wis. 20, 158 N. W. 280; *McDonald v. Provident S. L. Assur. Soc.* 108 Wis. 213 (84 N. W. 154), at p. 216; *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46 (65 N. W. 742), at p. 48; *Joliffe v. Madison M. Ins. Co.* 39 Wis. 111, at p. 119.

ESCHWEILER, J. (*dissenting*). I concur in the above dissent for the reasons therein stated and also in view of the fact that at the time the application was sent to defendant it was bound to take notice from the recital therein that an

arrangement as to payment was claimed to have been made between the insured and defendant's local subagent. Being charged with that knowledge, the insured was entitled to act upon the implied assurance, from the retention of the note and failure to return the same, that such was recognized by the defendant as the giving of credit and the extension of time as well under the waiver as under the original transaction.

A motion for a rehearing was denied, with $25 costs, on November 4, 1919.

BRAUN, Appellant, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

May 1—November 4, 1919.

Damages: Personal injuries: Sufficiency of evidence: Special issue: Negligence: Trial: Repeated use of the word "direct" in instructions: Ignoring elements of damages in instructions: Review: Harmless error.

1. In an action for personal injuries sustained by plaintiff due to a derailment of defendant's train on which he was a passenger, an instruction on the measure of damages in which the court repeatedly used the word "direct" in stating that the injuries must have been a "direct result" of the accident, and that the damages must have "directly resulted" from the accident, is objectionable.
2. The trial court should have submitted in the special verdict the question relating to damages in the form requested by the plaintiff, viz.: "In the event that the plaintiff should be entitled to recover, at what sum should his damages be assessed?" instead of in the form submitted: "What sum would reasonably compensate the plaintiff for his loss and injury which was directly produced by the derailment of the train in question?"
3. An instruction on damages for personal injury which omitted several elements of loss proper to be considered by the jury, is erroneous where the instruction contains a clause that the jury should not include any other element.

4. Erroneous instructions on the measure of damages and the elements to be included were harmless as to plaintiff and not reversible error on his appeal, under secs. 2829, 3072*m*, Stats., where from an examination of the record the court is not convinced that if these errors had not occurred a more favorable result for the appellant might probably have resulted.
5. The conclusion arrived at by a consideration of the entire record, that the plaintiff had not suffered an injury to his head because of the accident, requires an affirmance of the judgment.

APPEAL from part of a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

The plaintiff, a traveling salesman about thirty-three years of age, on March 10, 1917, sustained personal injuries by reason of the derailment of one of defendant's trains on which he was riding as a passenger near Stark Station in Oneida county.

At the time of the derailment plaintiff was about in the center of the coach which was next to the smoking car. His testimony is to the effect that he was standing in the aisle, having just arisen, with one hand on the seat, and that by the jolting movement caused by the derailment he was thrown with great violence against the side of the coach, striking his right side against the corner of the window frame, injuring the musculospiral nerve of the right arm, causing great pain and partial paralysis of the arm. He also testifies that he was rendered unconscious and so injured that it caused a hemorrhage and nausea, and within a short time after the accident and before seeing any physician he bled from the nose and vomited blood. That there is a substantial loss of sensation on the right side of his body; such an injury to the head that there has been an entire loss of hearing in the right ear; a serious and permanent injury to his nervous system; a substantial impairment of memory; sexual impotence—all resulting in a condition described by some of the testimony as neurasthenia.

Dr. McMahon, a physician testifying on behalf of the

plaintiff, examined the plaintiff in June following the accident and subsequently. He found impairment of vision of the right eye and a loss of hearing in the right ear, limitation of motion in the joints of the right arm, and muscular weakness, a substantial absence of sensation in the entire right side of the body. That up to the time of the trial there had been an evident loss of weight and retrogression in his general appearance and in his nervous system. Assuming that the plaintiff was injured as he stated he was by the accident, the witness believed that his condition is entirely due to the injury he sustained at the time of his accident, and that he has both organic and functional disturbance. Assuming an accident, he has had either a hemorrhage into the skull cavity or else he has also had possibly a fracture at the base of the skull on the right side of the head. He may show some improvement from time to time, but the witness did not think that plaintiff will ever be a well man again and he may get worse, and that unless he shows a very marked degree of improvement he will never be able to carry on his regular business.

Other medical testimony is to the effect that he has a form of psychic or mental epilepsy, due to an injury to his brain on March 10, 1917, assuming that he was injured as he testified. Also that his function of equilibrium is substantially impaired, caused by a pressure within the labyrinth of the ear.

Defendant's medical testimony tended to indicate that there was a loss of sensation on the right side of the body attributable to the injury to the arm, that there was no evidence of any injury having been caused to the head or ear at the time of the accident, and that there was no ground for supporting the claim that there was any injury to the head at the time of the accident, or any such result as claimed by the plaintiff, and that the result of the tests made on examinations of the plaintiff indicated that some of

the conditions of which he complained were rather assumed than existing.

Plaintiff had been thrown from an automobile in June, 1915, at which time, according to a report he made in connection with an application for compensation, he stated that he had been bruised on his right side.

The jury by special verdict found that there was negligence on the part of the defendant which was the proximate cause of plaintiff's injury, and assessed his damages at $2,500. After verdict plaintiff moved for an order setting aside the jury's assessment of damages and a new trial on that issue or for an order setting aside the entire special verdict and granting a new trial. These motions were denied and judgment was directed in favor of the plaintiff for the $2,500 damages and costs, without prejudice to the rights of the plaintiff to take an appeal, and from judgment entered in accordance therewith plaintiff has appealed.

For the appellant there was a brief by *Drew, McMahon & McMahon,* attorneys, and *Alma Barry,* of counsel, all of Milwaukee, and oral argument by *Alma Barry* and *Stephen J. McMahon.*

For the respondent there was a brief by *W. A. Hayes* of Milwaukee, attorney, and *C. B. Bird* of Wausau, of counsel, and oral argument by *Mr. Bird.*

The following opinion was filed May 27, 1919:

ESCHWEILER, J. Plaintiff's main contention on this appeal is that the damages awarded by the jury were inadequate and that such result should be set aside and a new trial had for the reasons (1) that the form of the question in the special verdict as to the damages was wrong; (2) that the court erred in its instructions upon the subject of damages; (3) that the court erred in excluding evidence offered by plaintiff, or in admitting evidence offered by defendant on the subject of damages; (4) because a new trial should be

had on the ground that such award of damages was grossly inadequate, contrary to the overwhelming evidence and the law, or as an improper exercise of their duty by the jury.

The plaintiff requested the submission of the following question:

"5. In the event that the plaintiff should be entitled to recover, at what sum should his damages be assessed?"

The court refused to submit such question and did submit the following:

"5. What sum would reasonably compensate the plaintiff for his loss and injury which was directly produced by the derailment of train in question?"

This was answered by the jury at $2,500. In instructing the jury upon this question the court said as follows:

"... You are simply to say what the plaintiff's direct loss and injury amounts to when measured in money. In arriving at the amount of such loss and injury the jury should bear in mind that you are to include only such loss and injury as were the *direct* results of the derailment in question. With that limitation in mind you should, in answer to this question, name such sum as you find from the preponderance of the evidence, to a reasonable certainty, would be required to fairly *compensate the plaintiff in money* for, first, such loss of *time and earnings already suffered* and such as he is *reasonably certain to suffer* in the future, and for, second, such pain and suffering as he has *already endured* and such as he is reasonably *certain to endure* in the future, and for, third, such *reasonable expenses for medical and surgical care, treatment, and nursing* as he has in good faith incurred and will incur in the future in reasonable good-faith efforts to cure himself from the injuries received by him, all as the *direct* result of the derailment of the train in question. *You should not include any other element.*

"You should, of course, exclude from your consideration all loss and injury sustained by the plaintiff as the result of any other injury than the one received at the time of the derailment in question, *and all loss and injury resulting*

from disease wholly disconnected from the injury received at the time of the derailment in question. . . .

"(5) There is no mathematical rule by which you can compute with certainty the exact amount of plaintiff's loss, but you are to take into consideration all of the facts and circumstances shown from the evidence, and therefrom, in the exercise of your soundest judgment, fix upon such sum as you believe would be fair compensation, in money, for the loss and injury sustained by the plaintiff as the *direct result* of his injury received at the time of the derailment."

At another portion of the charge stating the issues, the court said that it would become the duty of the jury to determine the question of what consequences of loss and damage to plaintiff had *directly* resulted from the derailment in question.

We think there is proper foundation for the criticism made by the plaintiff of the repeated use of the word "direct" as it appears in the charge before us.

In a number of cases this court has held that in charging the jury as to their duty in determining whether or not injuries sustained were, under the law, to be attributable to the negligence of a defendant, the words "direct" and "proximate" do not have the same meaning and are not interchangeable terms. *Wills v. Ashland L., P. & St. R. Co.* 108 Wis. 255, 261, 84 N. W. 998; *Mauch v. Hartford,* 112 Wis. 40, 58, 87 N. W. 816; *Wheeler v. Milner,* 137 Wis. 26, 28, 118 N. W. 187; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 220, 78 N. W. 442.

While that distinction was made in cases where the question to be determined was whether the injuries were the proximate result of defendant's negligence, rather than as in the case before us where the question is whether the particular damages complained of were the result of the injuries suffered by reason of the negligence of the defendant, being one step beyond the situation presented in these cases, yet where the two questions are, from their nature, so

closely associated, it is the safer course to recognize this distinction for each as well as for the one. The trial court in his decision on this point suggests that the word "direct," as used by him in the charge and in the fifth question of the special verdict, would not, in its ordinary acceptation, restrict the jury's consideration to damages which developed on the very day of the injury; yet just such suggestion would be as appropriate to the charges condemned in the above cited cases as herein. Therefore the form suggested by the plaintiff for the fifth question in the special verdict, being the usual one and not subject to the objection here discussed, should have been given rather than the form adopted by the trial court.

The court charged the jury in substance that there were three elements of damages for them to consider: First, loss of time and earnings already suffered and such as he is reasonably certain to suffer in the future; second, such pain and suffering as he has already endured and such as he is reasonably certain to endure in the future; and third, such reasonable expenses for medical and surgical care, treatment, and nursing as he has in good faith incurred and will incur in the future in reasonable good-faith efforts to cure himself from the injuries received by him—all as the direct result of the derailment of the train in question; then adding, "You should not include any other element."

There was omitted from this enumeration of the various elements of damages for their consideration such elements as may, under proper facts, be considered by a jury in such class of cases, namely, loss of the capacity to enjoy life, or any diminution of such capacity; any elements of impairment of plaintiff's memory; reduction of his intellectual capacity; diminution of his mental vigor, and any loss of sexual power.

No request on behalf of the plaintiff was made that the court should charge the jury as to any of these last enumerated elements, and in default of such request so to charge

we could not say that the general language used by the court in its charge would have been reversible error on account of such omission except for the use of the clause, "You should not include any other element." This phrase must be considered as in effect withdrawing from the consideration of the jury any other elements of damage than those specifically mentioned by the court and would therefore naturally exclude from their consideration the elements for the omission of which the plaintiff now complains. This made the charge erroneous. This is especially so in the view taken by the trial court in his opinion in passing upon the plaintiff's motions where he states that, if the plaintiff suffered all the effects which he claimed to have suffered from the derailment, then the damages awarded are entirely inadequate, and if such consequences were established to be the direct and natural consequences of such an injury it could not be compensated by the allowance of $2,500.

We have examined the other assignments of error made by plaintiff as to the trial court's rulings on the admission or exclusion of evidence and find no material or prejudicial error therein.

For the errors in the submission of this case to the jury by the form of the fifth question of the special verdict and the improper limitation placed upon the subject and possible amount of the damages which the jury might consider under the charge, it would be incumbent upon us to remand this case for a new trial except for the positive direction placed upon us by the legislative will as expressed in secs. 2829 and 3072*m*, Stats. These have been discussed and the effect to be given to them considered and determined in a number of decisions. *Oborn v. State,* 143 Wis. 249, 126 N. W. 737; *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 306, 139 N. W. 179; *Wiese v. Riley,* 146 Wis. 640, 644, 132 N. W. 604; *Rodermund v. State,* 167 Wis. 577, 584, 168 N. W. 390.

These statutes require us now to examine the record on

the points involved and refuse to grant a new trial unless from such examination this court is convinced that, if the errors found in the record had not occurred, a more favorable result for appellant might probably have resulted. Such examination of the record does not so satisfy us.

Unless at the time of the derailment of the train the plaintiff did receive an injury to his head whereby some resultant damage was done to the inner right ear, then many of the elements of damage relied upon by plaintiff in his claim that the award of the jury of $2,500 was inadequate have no support in this case. He and members of his family testified to the effect that there was a discoloration of the side of the face and near the eye the day after the accident and for some time thereafter, and he testifies to having had hemorrhages shortly after the accident and at intervals for some time thereafter, and to being nauseated and vomiting blood within an hour or two of the accident. But the significant features of the case with reference to that situation are these: that neither at the time of the accident nor on the trip to Rhinelander after the derailment, nor while under the observation of his own physician and other physicians at Rhinelander during a period of several hours, does it appear that he mentioned to any one that there had been an injury to the head or ear or that he had bled or been nauseated. None of these physicians at Rhinelander observed anything that indicated an injury to the head.

This conclusion we are compelled to arrive at from the consideration of the entire record, requires an affirmance of the result in the trial court.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on November 4, 1919.

DELLS PAPER & PULP COMPANY, Respondent, vs. WILLOW RIVER LUMBER COMPANY, Appellant.

May 1—November 4, 1919.

Specific performance: Sale of logs and pulp wood: Exhaustion of contract remedy: Adequate remedy at law: Contracts: Enforceability: Time of determination of validity: Construction by parties: Award of damages: Venue: Place of trial: County where action was begun: Courts: Special term: Logs and logging: License to enter and cut: Revocability.

1. If no steps were taken to change the venue, an action is properly triable in the county where it was begun.
2. An action to compel specific performance of a contract to sell lumber or pulp wood and to enjoin defendant from interfering with the plaintiff exercising its contract rights, properly triable in the county where it was begun, may be tried, under sec. 113.11, Stats., in another county of the same circuit at a general term of court; the general term for one county being a special term for the other.
3. The purchaser of logs and pulp wood from the defendant lumber company is not obliged first to exhaust its remedy under the contract by cutting the timber itself or attempting to go on defendant's lands for that purpose, the lumber company having expressly revoked, canceled, and terminated the purchaser's license to cut the timber.
4. In this case the purchaser, suing for specific performance of the contract, has not an adequate remedy at law as plain, adequate, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy.
5. The contract is not so indefinite and uncertain as to be incapable of specific performance by the lumber company at the suit of the plaintiff paper company because of options to be exercised by the lumber company, most of the uncertainties complained of arising by reason of the lumber company's wilful breach, and the contract providing for all reasonable contingencies.
6. A clause in the contract permitting the paper company to enter upon the lumber company's lands and cut the timber it had purchased is more than a mere license, it being a privilege incident to a valid grant, evidenced by a written instrument, supported by a valid consideration, has been acted upon by the plaintiff, and is therefore not revocable.

7. Where it is claimed that a contract would tend to foster a monopoly, its validity must be determined as of the time when it was made and not as of the time when specific performance is sought.
8. The paper company is entitled to specific performance of the contract, which is definite and certain, its legal remedy being inadequate and valuable rights under the contract being preservable to it in no other way, the contract having been performed by the lumber company for seven years and finally breached only on account of an advance in the price of logs and pulp wood.
9. The court having taken jurisdiction for the determination of the equitable issues involved in a suit for specific performance, properly determined and awarded damages sustained by the plaintiff from the time of the breach by defendant to the date of the judgment.
10. Where a lumber company operated a logging railway for seven years and without objection made settlement on a certain basis with the purchaser of logs and pulp wood from it and a railway company which carried the logs from the end of the logging road to the purchaser, such acquiescence is conclusive against the lumber company as to the basis on which the contract freight rate was to be apportioned between its logging road and the purchaser in the latter's suit for specific performance.

APPEALS from a judgment and an order of the circuit court for Eau Claire county: CHESTER A. FOWLER, Judge. *Order affirmed; judgment modified and affirmed.*

The appeals were from a temporary injunctional order and from the final judgment in the same action and were heard together.

The plaintiff corporation is engaged in operating a paper and pulp mill in the city of Eau Claire. The defendant corporation is the owner of a large amount of timber lands and is engaged in operating sawmills, planing mills, and in carrying on a general lumber business at Hayward, Wisconsin. On October 26, 1909, the plaintiff as party of the second part, and the defendant as party of the first part, entered into a contract the principal provisions of which are as follows:

"The said first party [defendant] does hereby agree to

sell to the party of the second part [plaintiff] the timber, logs, and pulp wood hereinafter described, to cut said timber into logs and pulp wood, to load said logs and pulp wood on cars and deliver the same to the party of the second part" at the place specified. "Said timber, logs, and pulp wood are described as follows: one hundred million feet of hemlock logs located on the lands of said first party, a description of which lands is contained in the paper hereto annexed and marked Exhibit A; also all spruce and balsam timber suitable for either logs or pulp wood of the kind hereinafter specified located on said lands; also such hemlock pulp wood of the kind hereinafter specified as the said first party may at its option desire to cut from said lands, and also all sound green hemlock logs and pulp wood of the kind hereinafter specified which said first party shall cut and deliver from said lands."

The contract then provides the size and length of the logs, the kind of timber from which it shall be cut, how various adjustments as to broken logs and crooked logs shall be made, the length and dimensions of the pulp wood from hemlock, spruce, balsam, and tamarack; that the lands shall be cut clean as the logging operations progress, how the same shall be scaled and measured, and provides that "the first party shall deliver said logs and pulp wood between the 1st day of May, 1910, and the 1st day of January, 1926, all deliveries to be made between the 1st day of May and the 1st day of January in equal amounts each month as far as possible." In 1910 to 1913, both inclusive, four million feet of hemlock logs were to be delivered annually. From 1915 to 1925, both inclusive, seven million feet of logs were to be delivered annually. The contract further provides as to how the logs shall be loaded on cars, and continues:

"The party of the second part, in consideration of the promises and agreements on the part of the first party, hereby agrees to purchase said hemlock, spruce, balsam, and tamarack logs and pulp wood which the said first party agrees to sell and deliver as aforesaid, and to pay for the same on the 10th day of each month in cash for all logs and pulp wood delivered during the previous month,"

on a basis of a scale of prices running upwards from $11 per thousand feet for hemlock, balsam, and tamarack and $17.50 per thousand feet for spruce logs, to $13 per thousand feet for hemlock logs, to $12.50 per thousand feet for balsam and tamarack logs, to $19 per thousand feet for all spruce logs. There was also a graduated scale of prices for the pulp wood. The contract further provided that in case the first party should purchase additional lands it might furnish the logs and pulp wood described in the contract from such acquired lands. There was also a provision that if the timber should be destroyed by act of God the first party should be relieved to that extent from making delivery. The first party reserved the right to peel the hemlock logs, and in the event that it chose not to peel them the second party had the right to peel. The cars were required to be loaded to the minimum and not beyond the maximum capacity of each car. The first party agreed to pay the taxes and assessments levied against the lands, and timber, logs, or wood cut therefrom and not delivered prior to the 1st day of May each year. The first party warranted the title to all of the timber, logs, and pulp wood that should be delivered under the contract. The contract then provides:

"In case of any default of said first party, its successors or assigns, in cutting or delivering any of said logs or pulp wood, said second party, its successors and assigns, shall be, and is, hereby authorized to enter upon said lands and cut, remove, and load on cars as aforesaid all logs and pulp wood of the kind and character hereinafter described for the fulfilment of said contract, in any year in which a default may exist, and for such work said second party shall be allowed and be paid the actual cost therefor and ten per cent. thereof in addition as compensation for such work; but if said second party shall on account of such default enter upon said lands and cut and remove said timber, it shall be authorized to make its own selection of said hemlock logs and shall not be required to cut over more land than is necessary to obtain the amount of hemlock logs required to fulfil the terms of this contract."

The second party agreed to furnish and keep in repair one half of the cars necessary for the shipment of the logs and wood and to unload all cars promptly. The first party agreed that no cars should be loaded with more than one kind of timber, and that in shipments of pulp wood cars were to be loaded with one length of wood, all logs to be stamped by first party.

Prior to the making of the contract of October 26, 1909, a contract for a joint rate had been agreed upon, which was not then reduced to writing but was signed and dated November 27, 1909, by which the plaintiff agreed that it would deliver to the Superior & Southeastern Railway Company the materials specified in the contract loaded on flat cars, the same to be transported to Grand View station and there to be delivered by the Superior & Southeastern Railway Company to the Omaha Company. Plaintiff further agreed to pay the Omaha Company and the Superior & Southeastern Railway Company for the transportation of such logs and pulp wood four cents per hundred pounds, of which the Omaha Company was to receive two and one-half cents and the Superior & Southeastern Company one and one-half cents per hundred pounds. The contract was executed by the plaintiff and the Omaha Company and the Superior & Southeastern Railway Company, George C. Glover being president of the Superior & Southeastern Railway Company and also president of the defendant company.

The parties proceeded with the performance of the contract down to October 9, 1917, on which day the defendant wrote the plaintiff as follows:

"Owing to the fact that you have not unloaded the cars of pulp wood shipped you and it has been necessary for us to tie up our loaders and discharge the crew, we therefore notify you that since you have violated the contract we will refuse to further ship you logs on the same."

On the 14th day of December, 1917, this action was begun, and upon affidavits and pleadings an interlocutory or-

der was made requiring the defendant to show cause why it should not be enjoined from interfering during the pendency of the action with the entry of the plaintiff upon the lands described in the contract and from cutting and removing therefrom the logs and pulp wood described in the contract, and enjoining the defendant from selling any of its hemlock *saw logs or other timber* standing or being on the lands described in the contract. The defendant answered, filed counter affidavits, and the matter was finally brought on for hearing. Meanwhile the parties entered into a contract which was to be without prejudice, by which the defendant was to furnish the logs required under the contract for which the plaintiff was to pay $14.75 per thousand feet, it being agreed that if it was finally determined that the contract was enforceable the defendant would repay to the plaintiff the excess received by it over the contract prices. On the hearing the court ordered the defendant to continue with the performance of the contract, the same to be paid for as agreed between the parties at the rate of $14.75 per thousand feet. It was further provided that if the defendant elected not to furnish the logs and timber as ordered by the court, then the plaintiff might enter upon the defendant's lands and cut and get out such logs in the manner provided by the contract, and restrained the defendant from interfering therewith, and the defendant was enjoined from disposing of either its logs or its lands in such quantity or manner as would prevent it from supplying the logs and timber to the plaintiff during the term of the contract; the order to become operative upon the plaintiff filing a bond in the sum of $100,000. The bond was filed and the case was tried.

The court found that the plaintiff had been engaged for many years in manufacturing paper from pulp wood and in the manufacture of pulp; that to operate plaintiff's mill and grind its pulp wood requires a large amount of power, to

secure which the plaintiff entered into a ninety-nine-year lease with the city of Eau Claire for power generated by the Dells dam; that to utilize the power so leased the plaintiff had constructed a large and expensive manufacturing plant, to operate which required substantially seven million feet of hemlock pulp per year, and by reason of extensions will require from twelve to fourteen million feet per year in the future. That the supply of available raw material is being rapidly consumed, and that at the present rate of consumption little will be available in the open market after ten years.

That during 1909 the plaintiff, for the purpose of extending the life of its plant and the use of its lease, was buying timber lands; that because of the contract entered into between the plaintiff and the defendant such negotiations were broken off.

That the contract of October 26, 1909, was executed, acknowledged, and duly recorded in the office of the register of deeds of Ashland and Bayfield counties. That, relying upon the contract, the plaintiff limited its purchases of pulp wood and pulp-wood lands and made no other provision to supply its plant during the period covered by the contract. That since the making of the contract the price of pulp wood and pulp-wood lands has largely increased, and that if the contract is not performed plaintiff cannot supply its mills except at prices which will endanger its ability to manufacture pulp wood in competition with other manufacturers.

That if the defendant does not perform the contract of October 26, 1909, it will result in a large loss to the plaintiff, not now ascertainable or determinable, by reason of endangering the length of life of its plant and its ability to utilize its water-power lease. That plaintiff cannot now and could not since October 9, 1917, make contracts for a period or except from year to year, and that the defendant had per-

formed its contract down to October 9, 1917. That plaintiff had substantially performed the contract on its part, such delays as occurred being slight and inconsequential and being fully waived by the defendant. That until the fall of 1917 the contract had been carried out by both parties in a spirit of mutual accommodation, and that the accommodations received by the defendant from the plaintiff were fully equivalent to those that had been conferred by the defendant upon the plaintiff.

That plaintiff was not in default on the 9th day of October, 1917, except for payment of one car of logs amounting to substantially $45, which through mistake had been delivered to the wrong place by the railway company. That the plaintiff had not, shortly prior to October 9, 1917, notified the defendant not to ship any further logs under the contract or arbitrarily directed it to withhold shipments, but such requests as were made were made pursuant to and in reliance upon the spirit of mutual accommodation that had theretofore obtained between the parties.

That on November 9, 1917, the defendant gave the notice heretofore described, and that on October 15, 1917, the defendant further notified plaintiff to the effect that it would not perform said contract, alleging as a reason therefor that the plaintiff had failed to furnish its one-half of the cars required for service under the contract; that none of the reasons assigned by the defendant were well founded in fact or set forth the motive of the defendant for its refusal, but the motive in fact for such refusal was that the cost of getting out the timber had so increased through rise in prices of labor and supplies that the price of logs under such contract was then about $3 per thousand feet below the market price, and that the refusal of the defendant to further perform was arbitrary and unjustifiable, and that since October 9, 1917, the defendant has ever refused to perform said contract and continued in its repudiation thereof and has

continuously denied the plaintiff any rights thereunder, including the right to enter upon the lands described in the contract and cut therefrom the timber required by said contract.

That immediately upon receipt of such notice from the defendant the plaintiff made diligent effort to procure timber elsewhere and did procure seven million feet at a price of $15.50 per thousand feet f. o. b. Morse, which was then a reasonable and fair price therefor, three million feet of which were delivered to the plaintiff during the year 1917, and by means of which the plaintiff was enabled to keep its plant in operation. That the arrangement between plaintiff and defendant heretofore stated was entered into by which plaintiff was to pay $14.75 per thousand feet, and that the order requiring the defendant to deliver logs at the agreed price of $14.75 per thousand feet was entered as stated.

That the defendant owns property consisting of timber lands and manufacturing plant at Hayward, Wisconsin; that it is converting a large portion of its standing timber into lumber and selling the same, and that when the last of its timber is cut the plant will be of but little value, and "if the defendant, between now and the time when such contract will expire by limitation, divides its surplus and profits with its stockholders, it is extremely doubtful whether it will be financially able to pay the plaintiff the damages it has sustained and will sustain if the defendant is not compelled by decree of this court to perform its said contract."

That it is impossible to determine the market value of the logs specified in the contract; that it is uncertain whether, after a period of ten or twelve years, paper and pulp manufacturers will be able to get any substantial portion of their supply in the open market; that the only other available supply is Canada, which is subject to export laws of the Canadian government and to tariff regulations.

That the defendant has been and now is logging the lands

as described in the complaint; that the plaintiff has not for many years last past been engaged in logging, and that the defendant can log the material covered by the contract at a much less expense than the plaintiff. That part of the lands described in said contract are owned in common by the Omaha Railway Company and the defendant, but there is a sufficient amount of hemlock timber of the kind and character specified in the contract still standing upon the lands owned by the defendant to enable it to deliver the undelivered portion of the hemlock pulp logs specified in the contract. That from the beginning of the contract up to October 9, 1917, the plaintiff had paid to the defendant for hemlock, spruce, and balsam delivered to it under the terms of the contract $100,000 in excess of the market price at which plaintiff could have bought the same in open market. That plaintiff owes to the defendant for materials shipped during the month of September and up to October 9, 1917, $3,110.82, for which payment was not due at the time the defendant served notice of terminating the contract.

That during the year 1917 the defendant did not deliver three million feet of hemlock logs out of the seven million feet which it was required to deliver under the terms of the contract, and that these logs if delivered would have been worth the amount paid by the plaintiff, $15.50 per thousand feet, for logs purchased, which were delivered at Eau Claire at a freight rate of .124 cents per hundred pounds in excess of the freight rate from Grand View station to Eau Claire.

That during the month of October, 1909, the Superior & Southeastern Railway Company, although a common carrier, was practically doing no other business than that of a logging road of the defendant company; that all of its stock was owned by John E. Glover and members of his immediate family except one share, and that at said time the stockholders of the *Willow River Lumber Company* con-

sisted of John E. Glover and members of his family, and that George C. Glover was president of both companies; that John E. Glover was a director in both and active in the affairs and the controlling mind of both. That as a part of the same transaction which resulted in the making of the contract of October 26, 1909, a contract between the plaintiff, the Superior & Southeastern Railway Company, and the Omaha Company was made. That the plaintiff purchased the pulp wood and material specified in the contract relying upon such contract with the railway companies, and that such joint rate agreed upon was duly published and ever since has been in force. That commencing with the first shipment the Omaha Railway Company collected from the plaintiff the full joint rate of four cents per hundred pounds; that in making monthly settlements down to September, 1917, the plaintiff credited the defendant with materials shipped at the contract price and charged it with its proportion of the freight figured at one and one-half cents per hundred pounds; that such deductions for freight were accepted and allowed by the defendant without criticism or comment and no objection made until after the commencement of this action. That at the time of the making of the contract there was a local rate on pulp wood from Grand View station to Eau Claire of 3.55 per hundred pounds, and a local rate from points on the Superior & Southeastern Railway to Grand View station of $1.25 per thousand feet; that all cars were shipped direct from the loading point to Eau Claire and consigned to the plaintiff under the four-cent rate.

That at the time of making the contract of October 26, 1909, the defendant had full knowledge of the agreement theretofore made between the plaintiff, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Superior & Southeastern Railway Company, whereby such joint rate was established, and entered into the contract of

October 26, 1909, with a full understanding that the defendant would pay one and one-half cents per hundred pounds from the point of loading to Eau Claire. That said John E. Glover procured said contract of transportation for the purpose of inducing the plaintiff to purchase of the defendant the materials described in the contract, and that plaintiff made such purchase relying upon and because of the joint rate so established.

As conclusions of law the court found:

1. That plaintiff was entitled to a decree in the alternative requiring defendant either (1) to fulfil and carry out said contract of October 26, 1909, or, on defendant's failure to do so, (2) authorizing and empowering the plaintiff to enter upon the lands described in the contract in accordance therewith and proceed as provided therein.

2. That the decree should require the defendant to elect, within thirty days from service of the notice of entry of judgment, whether or not it will perform for the year 1919, and file a like election on the 1st day of July during each succeeding year covered by the contract.

3. That such decree should require the defendant to elect within a like period whether it will deliver to the plaintiff the three million feet of logs called for by the contract not delivered during the year 1917.

4. That such decree should also require the plaintiff to perform all the provisions of said contract on its part to be performed.

5. That judgment should be entered and the defendant by such decree be required to pay to the plaintiff, in case it shall elect not to deliver said three million feet of logs or shall fail to make such election, the sum of $10,872, with interest from January 1, 1918, to compensate the plaintiff for the difference in cost to it of the three million feet of hemlock logs purchased, together with such sum as the defendant shall owe by reason of the agreement heretofore referred to, based on the difference between the contract

price and the price of $14.75 per thousand feet, less the sum of $3,110.82, due the defendant on account of September and October, 1917, shipments and one car shipped in July and inadvertently omitted in subsequent settlements. Judgment was entered accordingly, from which judgment the defendant appeals. The defendant also appeals from the interlocutory order.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray* of Ashland, attorneys, and *Horace B. Walmsley* of Milwaukee, of counsel, and a supplemental brief by *Sanborn, Lamoreux & Pray,* attorneys, and *T. M. Holland* of Park Falls, of counsel; and the cause was argued orally by *Mr. Walmsley, Mr. Frank B. Lamoreux,* and *Mr. Holland.*

For the respondent there were briefs by *Bundy & Wilcox* and *P. M. Beach* of Eau Claire, and oral argument by *C. T. Bundy.*

The following opinion was filed June 25, 1919:

ROSENBERRY, J. There are 119 assignments of error argued under twenty-three separate heads, appellant's brief containing 300 pages. No attempt will be made to set forth in detail all of the questions raised on this appeal; they have all been considered, but only the more important will be treated.

The lands described in the contract are located in Ashland and Bayfield counties. The action was begun in Sawyer county, but was tried in the circuit court for Eau Claire county.

Sec. 2619, Stats., provides:

"The proper place of trial of civil actions is as follows, respectively:

"First. Of an action within one of the classes next following, the county in which the subject of the action or some part thereof is situated, viz.:

"(1) For the recovery of real property, or of an estate

or interest therein, or for the determination in any form of such estate or interest, or for an injury to real property.

"(2) . . .

"(3) For the foreclosure, redemption or other satisfaction of a mortgage of real property."

The action was begun in Sawyer county and no steps were taken to change the venue, so the action was properly triable in Sawyer county. *West v. Walker,* 77 Wis. 557, 46 N. W. 819. The question is, Can this action, properly triable in Sawyer county, be tried in Eau Claire county at a special term for Sawyer county, both counties being in the same circuit, said term being a general term for Eau Claire county, under the provisions of sec. 113.11, Stats., which provides that all business may be done at a special term which might be done at a term in the county where the business arises, except (a) the trial of issues by a jury, and (b) the trial of issues of fact in actions made local by law and arising in some county other than the one in which such special term is held?

This action was one to compel specific performance and to enjoin the defendant from interfering with plaintiff's exercising its contract rights and is therefore an equitable action and is not triable by jury. It is not an action made local by sec. 2619, Stats., as the decree in this case operates not upon the land but upon the person. The court is not asked to pass title to anything by its decree. Its judgment is that the defendant perform its contract, or, in the event of its failure to perform it, that it do not interfere with its performance by the plaintiff in the manner specified in the contract.

The defendant's next proposition is that the contract should not be specifically enforced because it contains within its provisions a remedy which the plaintiff should first exhaust before seeking the aid of equity. In view of what was said by the defendant in its letter of October 9, 1917,

which stated, "we will refuse to ship you logs on the same," referring to the contract, some question might have arisen as to how far the plaintiff should have gone in attempting to carry out the contract under the provisions authorizing it to enter upon the lands in case of the defendant's default. Upon the order to show cause why a temporary injunction should not be granted, the defendant then insisted and at all times has insisted that the plaintiff had no rights under the contract, that the contract was wholly at an end, and this action is brought for the very purpose of enabling the plaintiff to avail itself of the remedy which the contract gives it.

In its answer the defendant alleged "that the defendant had expressly revoked, canceled, and terminated the said license, authority, and permission, and . . . that when this action was commenced said license, authority, and permission was no longer operative or in force, and for that reason is not, and was not when this action was commenced, any longer subject to enforcement." Under such circumstances the plaintiff was not required to go through the useless formality of attempting to enter upon the defendant's lands.

It is next contended that the plaintiff has an adequate remedy at law and will not suffer irremediable injury if the contract is not enforced. In the statement of facts there has been set forth very briefly the facts found by the trial court upon which the conclusion is based that plaintiff's legal remedy is inadequate. There must not only be a remedy at law, but that remedy must be plain and adequate and as practicable and efficient to the ends of justice and its prompt administration as is the remedy in equity. *Miller v. Drane,* 100 Wis. 1, 75 N. W. 413. Not only is the remedy inadequate as found by the trial court, but the principles applicable to a contract for the sale of lands should apply here. Where competent parties have made a contract for the sale of lands which is reasonably certain in all its parts and not objectionable for unfairness or inequity, there is no room

for the exercise of judicial discretion as to whether it should be specifically performed or not. Such performance is a matter of right. *Heins v. Thompson & Flieth L. Co.* 165 Wis. 563, 163 N. W. 173. So here there was a contract to cut and deliver certain kinds of timber from certain tracts of land to meet a specified purpose. It is clearly shown that no other like opportunity is open to the plaintiff. Such a contract cannot now be made. The defendant had the benefit through seven years of the full performance of the contract and is certainly in no position to complain or to shield itself behind the claim that the plaintiff has an adequate remedy at law. Not only are the damages practically impossible of ascertainment with any fair degree of accuracy, but the amount of material to be delivered can be determined only by the completion of the contract. To require plaintiff to shut down its plant or to run it with an inadequate supply of raw materials, lose the benefit of its power lease and of its plant investment for an indefinite period, under the circumstances found by the trial court, would be manifestly inequitable and unjust. It would be manifestly impossible for the plaintiff, in view of the unknown and changing costs of labor, supplies, and transportation, to prove its damage over the remaining period of the contract. Under the facts found by the trial court it is doubtful whether or not the plaintiff could secure in the later years of the contract period materials at a price which would permit it to use its plant. The evidence is ample to sustain the findings of the trial court, and the conclusion necessarily follows that the plaintiff's legal remedies are inadequate.

The defendant further claims that the contract is too indefinite and uncertain to be capable of specific performance, both in its provisions relating to the defendant doing the work and in its provisions relating to plaintiff doing the work under the entry clause.

Most of the uncertainties complained of, if such there

be, arise by reason of the defendant's wilful breach of the contract. Under the contract the defendant may at its option deliver certain hemlock and tamarack pulp wood. The first party (defendant) also agrees to peel the hemlock logs, and in the event of its failure to peel said logs the second party (plaintiff) shall have the right to peel the logs and retain the bark. The contract contained certain other options as to substitution of lands and as to other matters. It is thought that because of these options which the defendant had under its contract the contract is incapable of specific performance because the plaintiff in the event of its entry under the entry clause could not exercise these options. These and other uncertainties are imaginary and fanciful. If the defendant in defiance of the decree of the court continues in its refusal to perform the contract and to comply with the court's decree, such refusal must amount to a waiver of its options under the contract. With these options eliminated all uncertainties disappear, and the plaintiff will be authorized to enter upon the lands in accordance with the terms of the entry clause and cut and remove therefrom the material therein specified. The case of *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 89 N. W. 532, has no application to the facts found by the trial court in this case. The contract in this case is definite: the timber and pulp wood are to be cut from certain lands, delivered at a particular place and in a certain way. No peculiar skill or ability is required to cut and log hemlock timber, and there is no reason why it may not as well be done by one person as by another. That it may be done much more advantageously by the defendant, which is fully equipped and organized for such work, is, as the trial court finds, clearly apparent. If, however, the defendant continues to violate the terms of its contract and to defy the decree of the court, the increased cost of operation will fall upon it under the terms of the contract. The contract was performed for seven years in

a spirit of mutual helpfulness and accommodation and a practical construction has thereby been placed upon the contract which in case of controversy ought to furnish a reliable guide to future action. The contract by its terms provides for all reasonable contingencies. It being one enforceable by a court of equity, the defendant has no power to terminate it, much less the right to do so. Whatever loss or injury the defendant sustains will be the result of its own wrongdoing.

It is claimed that the entry clause contained in the contract is a mere license to enter upon and cut, and was therefore revocable and was in fact revoked before the commencement of this action. Without entering into a discussion as to the exact nature of the plaintiff's rights under the entry clause, it is sufficient to say that in this case, under the facts found, the plaintiff's rights were more than those of a licensee under a revocable license. Here, the plaintiff had for seven years performed the contract in reliance upon this provision; it was a part of the consideration for the contract, a valuable part. Plaintiff has expended $100,000 in excess of the market price of the material which it has received in reliance upon the contract, of which the right of entry was a material and substantial part. To deny the plaintiff the right to enter upon the lands of the defendant and take therefrom that which it has purchased, would, as found by the trial court, inflict an irreparable loss upon the defendant and would amount to a fraud. The privilege here given was incident to a valid grant, is evidenced by a written instrument, is supported by a valid consideration, has been acted upon by the plaintiff, and is therefore not revocable.

It is argued that specific performance should be denied upon the facts found by the trial court, for the reason that specific performance of the contract would be detrimental to the public interest in that it would tend to foster a mo-

nopoly. No facts appear upon the record and none are called to our attention upon which such a claim can be based. The validity of the contract must be determined as of the time it was made and not as of the time when specific performance is sought. However, it is not intended to intimate that, if the facts as they now exist had existed at the time of the inception of the contract, anything appears upon which a finding could be based that specific performance of the contract would be in any way detrimental to the public interest.

Upon the whole case the plaintiff is clearly entitled to the decree of specific performance of the contract. The contract is definite and certain, the legal remedies of plaintiff are inadequate, and valuable rights under the contract can be preserved to it in no other way. The defendant entered into a fair contract and for many years it proved to be a very profitable one. Because the market price of the material covered by the contract has advanced, defendant seeks to be relieved of its solemn obligation formally entered into. If the contract were not one capable of specific performance the defendant would have the power to terminate it, but being capable of specific performance it must perform the contract or submit to the legal consequences. Specific performance of the contract was properly decreed by the trial court. *Heins v. Thompson & Flieth L. Co.* 165 Wis. 563, 572, 163 N. W. 173; *Kipp v. Laun,* 146 Wis. 591, 131 N. W. 418; *Curtis L. & L. Co. v. Interior L. Co.* 137 Wis. 341, 118 N. W. 853; *Daniels v. Bailey,* 43 Wis. 566, 569; Pomeroy, Contracts (2d ed.) sec. 6; Waterman, Spec. Perf. § 15; *St. Regis P. Co. v. Santa Clara L. Co.* 173 N. Y. 149, 65 N. E. 167; *S. C.* 186 N. Y. 89, 78 N. E. 701.

The court having taken jurisdiction for the determination of the equitable issues involved, also determined and awarded damages which had been sustained to the time of judgment. This was correct and clearly within its power.

Combs v. Scott, 76 Wis. 662, 672, 45 N. W. 532; *McLennan v. Church,* 163 Wis. 411, 158 N. W. 73.

The contract of October 26, 1909, contained the following provision:

"Said first party [defendant] does hereby agree to sell to the party of the second part [plaintiff] the timber, logs and pulp wood hereinafter described, cut said timber into logs and pulp wood, load said logs and pulp wood on the cars, and deliver the same to party of the second part at Grand View on the Ashland division of the Chicago, St. Paul, Minneapolis & Omaha Railway."

The logs were hauled to Grand View by the Superior & Southeastern Railway Company. At the time the contract was entered into there was a local rate on the Superior & Southeastern Railway, from the point where the logs were loaded, to Grand View, of $1.25 per thousand feet. Contemporaneously with the making of the contract of October 26, 1909, the plaintiff, the Superior & Southeastern Railway Company, and the Omaha Company entered into a contract for a joint rate by which the logs were to be transported from the loading point to Eau Claire and delivered to the plaintiff for four cents per hundredweight, which was to be apportioned between the Superior & Southeastern Railway Company and the Omaha Railway Company, the Omaha Railway Company receiving two and one-half cents and the Superior and Southeastern Railway Company one and one-half cents per hundredweight. During the seven years that the contract was performed the Omaha Railway Company collected from the plaintiff freight at the rate of four cents per hundredweight. One and one-half cents per hundredweight was charged to defendant and deducted from time to time from the amounts owing by the plaintiff to the defendant, the defendant under the contract being required to pay the freight on the logs to Grand View, the junction point of the Omaha Railway Company. The trial court

found that the Superior & Southeastern Railway Company was practically only a logging road of the defendant company; that the owners of the Superior & Southeastern Railway Company were John E. Glover and members of his immediate family; that the owners of the defendant company were John E. Glover and members of his immediate family; that the contract of October 26, 1909, and the contract between the plaintiff, the Omaha Railway Company, and the Superior & Southeastern Railway Company were parts of the same transaction; and it clearly appears that one contract was a consideration for the other. The court further found that the contract fixing the freight rate was made between the plaintiff and the railway company for the purpose of inducing the plaintiff to purchase of the defendant the material described in the contract and that plaintiff made the purchase relying upon the joint rate so established. While the rate contract was not signed until November 27, 1909, it was fully agreed upon prior to the signing of the contract of October 26, 1909.

Defendant contends that it ought to be required to pay no more than $1.25 per thousand feet, the local rate to Grand View. It appears that the rate of one and one-half cents per hundredweight amounts to $2.085 per thousand feet. The contention of the defendant is that the publication of the contract rate had no effect upon the local rate and that it should be charged no more than the local rate. The local rate from Grand View to Eau Claire on the Omaha Railway is 3.55 per hundredweight. If the plaintiff were required to pay the sum of the two locals it would have been compelled to pay a sum in excess of four cents per hundredweight. While the contract of October 26, 1909, does not specify the rate which the defendant was required to pay for delivery of the logs at Grand View, the conclusion of the trial court that the agreement to deliver the logs at Grand View amounted to an agreement to pay the freight as speci-

fied in the contract between the plaintiff and the railway companies, the defendant company having full knowledge of all the facts and circumstances, is one abundantly supported by the evidence. The contracts were not only made contemporaneously, one being a consideration for the other, one being made in reliance upon the other, but the defendant company made settlement for seven years without objection on this basis, which is conclusive as to the basis upon which the freight rate was to be apportioned. The defendant company has therefore been properly charged with one and one-half cents per hundredweight, and on subsequent shipments should be charged a like sum. If the defendant has thus indirectly paid the Superior & Southeastern Railway Company a greater sum than it is legally entitled to receive, and upon that we express no opinion, its remedy is against that company and not against the plaintiff, which is obliged to pay the contract rate to the Omaha Railway Company in order to get possession of its property.

It follows from what has been said that the order granting a preliminary injunction was right and should be affirmed.

By the Court.—Judgment and order appealed from affirmed.

ESCHWEILER, J., dissents.

The appellant moved for a rehearing, and the following opinion was filed November 4, 1919:

PER CURIAM. Appellant's motions for rehearing are denied without costs, except clerk's fees on both motions.

It is conceded upon the motion for rehearing in the main case that an error amounting to $951.28 was made in computing the amount of the judgment. This renders a modification of the mandate necessary. It is therefore ordered that the mandate be modified to read as follows:

"The order appealed from is affirmed. That part of the

judgment requiring the defendant to pay to the plaintiff the sum of $4,164.48, as therein specified, is modified so as to read $3,213.20, and as so modified the judgment is affirmed."

LUDWIG, Respondent, vs. LUDWIG, imp., Appellant.

May 3—November 4, 1919.

Specific performance: Promise of son to pay monthly sum to parents: Adequate consideration: Right to occupy premises: Statute of frauds: Parent and child: Gratuity: Husband and wife: Wife's contract: Validity: Agreement to execute mortgage: Homestead: Nonresident wife: Mortgages: Equitable lien.

1. Equity will not enforce a promise by a son and daughter-in-law to give to his parents $100 a month during the rest of their lives unless there is something that at least approaches an adequate consideration for the promise.
2. Nor will such an agreement be enforced in equity where the parents made no promises as a consideration therefor, made no improvements upon premises which they were permitted to occupy, and made no material sacrifice in moving thereon.
3. The son's agreement to pay his parents $100 a month during the rest of their lives, where there was no consideration therefor, was a mere revocable gratuity, which was revoked by his failure to carry it out. Nor could the wife, by joining in such an agreement, bind herself to its terms.
4. A parol agreement to permit parents to occupy certain premises during the rest of their lives was void under sec. 2304, Stats., requiring a contract of leasing for a period longer than one year to be in writing, and under sec. 2305 will not be specifically enforced where there has been no performance or fraud.
5. A wife who is a resident of another state cannot defeat an incumbrance of property upon the ground that it is a homestead, since the benefits of the homestead exemption, under sec. 2203, are available only to residents of the state.
6. Where money has been borrowed upon the assurance, relied upon by the lender, that a mortgage to secure a loan would be executed upon certain land, an equitable lien for the balance due upon the loan will be impressed upon the land.

7. An agreement to execute a mortgage upon land owned by the husband and wife to secure a loan was binding upon the wife, notwithstanding coverture, where the proceeds of the loan went into property in which both husband and wife were conducting their separate lines of business.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

For some time prior to August, 1908, the plaintiff, *Sarah Ludwig,* and her then husband, William Ludwig, were keeping a rooming house in Milwaukee near the United States government building, where William Ludwig for a long time had been and until his death continued to be employed. They had no definite lease and were keeping it for a friend of theirs, paying $15 or $20 per month rent and receiving from roomers $80 per month or more.

The defendant Roy J. Ludwig was a son of William and *Sarah* and had left their home many years before at the age of about fifteen, and in 1906 had married the defendant *Emma.* At the time of the marriage and of the transactions here in question both Roy and *Emma* were living in Chicago and in receipt of large incomes from separate enterprises conducted by each, of the nature of which the least said the better. In June of 1908 the defendants Roy and *Emma* purchased a house and lot in the residence portion of Milwaukee on Downer avenue, and in July purchased the next lot thereto, the deeds running to them as husband and wife. They spent considerable money in furnishing and fitting up the house and making additions thereto, so that finally there was an investment of over $16,000 in the property. Under an arrangement made in August, 1908, the testimony concerning which is set forth in the decision, the plaintiff and her husband moved into the premises on Downer avenue and lived there together until the death of William in 1917, and the plaintiff *Sarah* continued to live there after his death. Under a promise then made, pay-

ments of $100 per month to William and *Sarah* were kept up for a time.

In April, 1910, the defendant Roy obtained from the plaintiff *Sarah* $4,000 and used substantially all of it in the improvement of a certain saloon building described as the Casino, then owned by him and in a portion of which the defendant *Emma* conducted and carried on her enterprise. No part of this $4,000 was received directly by the defendant *Emma*. The defendant Roy repaid $1,125 of that loan by turning over to his mother a legacy received by him in February, 1916.

In November, 1910, the defendant *Emma* loaned to her husband, Roy, $4,500, part of which was used by him in connection with the repairing and furnishing of the Casino building and in the repairing of another building also owned by him in Chicago, and in January, 1912, she loaned to him an additional $2,000, also for such use. At the time of these respective loans trust deeds were executed by the defendant Roy to his wife upon his interest in the Downer avenue property.

The $100 a month payments were continued until February or March of 1914. In October of 1914 the defendants Roy and *Emma* separated, and in 1916 *Emma* started a foreclosure proceeding in the circuit court for Milwaukee county upon the trust deeds above specified without making *Sarah* or William Ludwig parties therein, and judgment by default was taken for the amount then due. The defendant Wisconsin Trust Company was trustee in said trust deeds, and the defendant P. J. Kelly was appointed receiver in such foreclosure action. Shortly thereafter the receiver commenced an action for unlawful detainer to regain possession of the Downer avenue property from William and *Sarah* Ludwig. In 1916 the plaintiff, *Sarah,* with her husband, William, commenced this action against the defendant *Emma E. Ludwig,* the Wisconsin Trust Company, and P. J.

Kelly as receiver, for the relief embodied in the findings and judgment hereinafter set forth, and defendant Roy J. Ludwig was brought into the action by the cross-complaint and application of *Emma E. Ludwig,* but he made no contest herein.

The court found that in the fall of 1908 there was a contract for a good and valuable consideration to the effect that the plaintiffs William and *Sarah* were to have the Downer avenue premises so long as either of them lived, and that as a further consideration for their changing their place of residence and giving up their rooming business and other good and valuable considerations then and in the future to be received, the sum of $100 per month during the lifetime of said plaintiffs or either of them. That the defendants Roy and *Emma* were to pay the taxes and assessments and all repairs on said premises. That the plaintiffs performed at great material sacrifice the things upon their part agreed to be performed, gave up their rooming-house business, took possession of the real estate, and made permanent and valuable improvements on said property at their own expense, and remained in possession ever since. That a loan of $4,000 was made in April, 1910, to the two defendants by *Sarah Ludwig* under an agreement that security in the form of a mortgage was to be given on the premises as a first lien and that such mortgage was also to be security for the payment of any sums then due under the agreement to pay $100 per month or that might thereafter be owing on account of such agreed payments. The court also found the balance due in these respective matters.

Judgment was thereupon entered, in substance providing, first, that the plaintiff, *Sarah Ludwig,* was entitled to the possession and use of said premises during the balance of her life; second, that the real estate was impressed and charged with an equitable mortgage lien in favor of plaintiff to secure the payment of the sum adjudged to be then due

her of $10,250 upon the promise, given in 1908, to pay the $100 per month, and that further sums of $100 per month will continue to fall due on the first day of each month after August 1, 1918, during the life of the said *Sarah Ludwig;* third, that the said real estate was further impressed and charged with an equitable mortgage lien in favor of the plaintiff for the sum of $4,528.52, being the balance of the $4,000 loan together with interest; fourth, that the real estate should be sold at public auction, subject, however, to the right of the plaintiff to the use and occupancy thereof during life, unless before such sale there should be paid the two respective sums above mentioned with interest, costs, etc., and that upon such sale, if one should be had, a deed to the purchasers thereof should be subject to the right of the plaintiff to such use and occupancy during her life, and that she should be paid out of the proceeds of any such sale the sums above mentioned, together with such further sums that shall then have accrued on account of the $100 per month; fifth, that if there should be any deficiency under such sale, then judgment should be rendered against the defendants *Emma E.* and Roy J. Ludwig, who were found to be personally liable for the payment of the debts above mentioned; sixth, that in case of the redemption from the effect of the judgment by the payment of the principal sums and then in the event of a subsequent default in any of the instalments of $100 per month, the plaintiff should be at liberty to apply to the court, at the foot of the judgment, for a further order and determination upon such default and for a sale of so much of said premises as would be sufficient to satisfy the amount then due; seventh, that the trust deeds for the $6,500 were in fraud of the rights of the plaintiff and in no wise prior or superior to the equitable liens of the plaintiff as thus determined; eighth, that the unlawful detainer action was wrongfully brought, and that the defendant *Emma E. Ludwig* should be restrained from interfering

with the possession, use, and occupancy of the said real estate by the plaintiff during her lifetime.

From such judgment the defendant *Emma E. Ludwig* has appealed.

For the appellant there was a brief by *Henry S. Sloan* of Milwaukee and *E. H. Morris* of Chicago, attorneys, and *Charles E. Pierce* of Janesville, of counsel; and the cause was argued orally by *Mr. Pierce* and *Mr. Sloan.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter D. Corrigan* and *Walter L. Gold.*

The following opinions were filed May 27, 1919:

ESCHWEILER, J. This judgment, so far as it relates to the amounts due or to become due under the promise to pay $100 a month, must be supported, if at all, as a basis for the relief granted in the court below upon the testimony as to conversations between the defendants and the plaintiffs in 1908, just prior to the moving by plaintiffs into the dwelling in question, and in 1910 at the time the $4,000 loan was made. This testimony was in substance that at an interview between them in 1908 at the rooming house where plaintiffs were then living, the defendants Roy and *Emma* said: "If you will sell out here and give up the place and move to Downer avenue, we will give you $100 per month as long as either of you live; we will keep up repairs and keep up the taxes, and you can have the premises as long as either of you live, undisputed by any one." The defendant Roy testified the same way as to the arrangement, with the additional phrases that "we [meaning Roy and *Emma*] will spend a month or six weeks a year with you there and see that you get that money at the end of every month. We guarantee to send you $100 a month." A son-in-law of the plaintiff testified substantially as above recited, and gave as his recollection of the conversation that the defendants

also told the plaintiffs that they, the plaintiffs, "were to go up and enjoy that new home."

Erom this testimony and from the other facts and circumstances in the record before us we are unable to find a sufficient foundation upon which can be based any of the relief granted by the court below upon this branch of the case.

In order to require or expect a court of equity to enforce specific performance of an executory contract such as was here involved by a promise to pay the $100 per month during the lifetime of the beneficiaries thereof, there should certainly be as the basis for such relief at least something that approaches an adequate consideration. *Hibbert v. Mackinnon,* 79 Wis. 673, 680, 49 N. W. 21; *Hay v. Lewis,* 39 Wis. 364, 369; *Hanson v. Michelson,* 19 Wis. 498, 508; *Smith v. Wood,* 12 Wis. 382; 36 Cyc. 545; Pomeroy, Eq. Jur. § 1293; Waterman, Spec. Perf. § 186; *Roseville T. Co. v. Curtiss* (N. J. Ch.) 92 Atl. 580.

The plaintiffs on their part promised nothing; there was no obligation on their part to take care of and look after the premises; no agreement to remain any specified length of time on the premises, or even to care for the same while so occupying the same; they were at liberty to leave at any time, and the defendants would have been without any remedy whatsoever as against them for so terminating the relationship. The plaintiffs did not then agree to do anything in the shape of repairs; indeed the defendants themselves assumed that obligation. Though it is recited in the findings of fact that the plaintiffs did make permanent and valuable improvements on the property at their own expense, we find no evidence in the record to support such a finding. Neither is there support in the record for the finding that there was a material sacrifice by the plaintiffs in moving to the Downer avenue property or any valuable consideration on their part performed or to be performed.

The promise to pay this $100 per month, therefore, was a

pure gratuity on the part of the defendant Roy; good, of course, so long as he elected to abide by it, but subject to his right to revoke it at any time as he did by failure to carry out the same. As to the defendant *Emma E. Ludwig* the promise was still more in the nature of a gratuity, and, even were it to be considered as savoring of a contract, it was of such a nature that she, as a married woman, could not enter into so as to be legally bound thereby.

The agreement or understanding between the parties, if what took place amounts to an agreement, was not in writing and therefore void under sec. 2304, Stats. There is no element of performance on the part of the plaintiffs in reliance upon such contract, or of fraud in the repudiating thereof, as brings it within the provisions of sec. 2305, Stats., or within any of the well established rules regulating the exercise of equitable powers of a court to enforce contracts.

Appellant also asserts that this real estate was considered and treated by the defendants as their homestead and that therefore there could be no incumbering of the same as against the defendant *Emma* without her assent thereto, evidenced by her signature, under the provisions of sec. 2203, Stats., defining a homestead, and under such decisions as *Rosenthal v. Pleck,* 166 Wis. 598, 166 N. W. 445. During all this time, however, the defendants Roy and *Emma* were residents of Illinois and not of Wisconsin. The benefits of the homestead exemption can, under the provisions of the section itself, be asserted only on behalf of those who are residents of this state. The defendant *Emma* does not meet the call of the statute and cannot, therefore, rely upon the same.

There is sufficient support for so much of the judgment as impressed an equitable lien for the balance due upon the $4,000 loan made by the plaintiffs to defendant Roy in April, 1910. As against him, he received the money upon

this assurance, relied upon by his mother, that a mortgage should be given on this land to secure such loan, and he ought not to be heard to the contrary, nor does he now contest such claim. The evidence is sufficient to warrant the finding of the trial court that the loan was made at the request of both *Emma* and Roy. Its proceeds went into property in which both defendants were conducting their separate lines of business and therefore sufficient to make such agreement binding upon *Emma* in spite of her coverture. So much of the judgment as makes the balance found due on this loan a prior lien upon the interests of either or both defendants *Emma* and Roy and prior and superior to any lien claimed by defendant *Emma* under her foreclosure proceedings against Roy, and all provisions for the enforcement by plaintiff of such lien by the usual proceedings in foreclosure for a personal judgment against the defendants *Emma* and Roy for any deficiency that might arise upon any such sale, will not be altered.

The judgment, however, must be set aside so far as it declares that the plaintiff is entitled to the use, possession, or occupancy of the premises during the balance of her life; that declares that plaintiff has any such right that she may enforce herein requiring defendants to pay the $100 per month; that interferes with the prior foreclosure in the action by defendant *Emma* on her trust deeds other than declares such judgment subordinate to the one to be entered herein.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

KERWIN, J. (*concurring*). I concur in the opinion in this case only upon the ground that the material findings are not supported by the evidence. If I understand the opinion of the court correctly, it is based mainly upon that

proposition. Individually I am of opinion that the findings are supported by sufficient evidence, but I am inclined to defer to the opinion of my brethren upon that point. If the findings are supported by sufficient evidence, I am convinced that the judgment of the court below is right and should be affirmed on the authority of *Henrikson v. Henrikson,* 143 Wis. 314, 127 N. W. 962, and cases there cited.

A motion for a rehearing was denied, with $25 costs, on November 4, 1919.

HOBERG, Respondent, vs. JOHN HOBERG COMPANY and others, Appellants.

May 28—November 4, 1919.

Corporations: Purchase of other corporation: Distribution of stock: Ratification by stockholder: Remedy of dissenting stockholders: Equitable relief: Mistake of law.

1. Where the defendant corporation purchased all the stock of the C. company so as to control its supply of raw material, but the proceedings by the stockholders of defendant which resulted in a distribution of the stock of the C. company to the stockholders were had under a mistaken supposition that the transaction when completed would leave defendant in control of the C. company, equity will grant relief to a stockholder who did not ratify the proceedings, there having been no dividend declared and the distribution being inimical to the interests of the defendant corporation.
2. A mistake of law does not always bar equitable relief.
3. The rights of creditors, the state, or third parties not being involved, it was within the power of the stockholders of the defendant corporation to make distribution to its stockholders of the shares of stock of the C. company which had been acquired by defendant, and no stockholder consenting thereto and participating therein and receiving his *pro rata* share can object on the ground that the act is *ultra vires.*
4. Where plaintiff, a stockholder in the defendant corporation, after discovering that the distribution to defendant's stock-

holders of the stock of the C. company was inimical to the best interests of defendant, tendered back the stock received by her, it is *held* that she had not ratified the distribution and was not estopped to maintain an action to compel a return of the distributed stock to the treasury of defendant.

ESCHWEILER and OWEN, JJ., dissent.

APPEAL from a judgment of the circuit court for Brown county: W. B. QUINLAN, Judge. *Reversed.*

This action was commenced by the plaintiff against the defendant corporation, the directors, and individual stockholders, to compel the return of the stock of the Crivitz Pulp & Paper Company to the treasury of the defendant corporation. The defendant corporation has a capital stock of $45,000, divided into 4,500 shares of the par value of $10 each. It is a family corporation and was organized in 1893 for the manufacture of tissue paper. It had been accustomed to purchase its raw material in the open market, but in the latter part of the year 1916 it proceeded to acquire a pulp mill, and for that purpose bought all of the stock from the stockholders of the Crivitz Pulp & Paper Company. The defendant company paid the individual stockholders of the Crivitz Pulp & Paper Company $230,500 for their stock, which was thereupon assigned to the defendant company; $80,250 was paid in cash, taken from the treasury of the defendant company, and $150,000 through a loan made by the defendant company. On November 7, 1916, at the time of the regular monthly meeting of the board of directors of the defendant company, there was also called a meeting of the stockholders of the defendant company. The minutes of the secretary do not show that any proceedings were had with reference to the stock of the Crivitz Pulp & Paper Company, five directors testifying that no such proceedings were had, three directors and the attorney of the company testifying that such proceedings were had. The trial court found that "on or about the 19th day of December, 1916, with direction from said *John Hoberg Company,* by its

directors, given November 7, 1916, and while said debt of $150,000 contracted as aforesaid by said *Hoberg Company* remained wholly unpaid, said Crivitz stock was distributed among the stockholders of said *Hoberg Company* and certificates of stock in said Crivitz Pulp & Paper Company were issued to the defendants and to plaintiff, who were the stockholders of said *Hoberg Company,* in proportion to their holdings of stock therein."

The court further found that the distribution of the Crivitz Company stock was made without consideration either to the *Hoberg Company* or the Crivitz Company; that plaintiff is a woman without any particular business experience or knowledge of corporate organization; that when apprised of the situation she tendered back to the *John Hoberg Company* the twenty-eight shares of stock of the Crivitz Company which had been issued to her and demanded that the defendant company institute an action to compel the other stockholders to return to the treasury of the defendant company the shares of stock of the Crivitz Company so issued to them; that the "parceling out of said Crivitz stock to the individual stockholders of said *Hoberg Company* was and is inimical to the interests of said *John Hoberg Company* and counter to and destructive of the purpose for which said stock was acquired by said company, and the interests of said company and its stockholders are jeopardized and prejudiced by having said stock outstanding and require that said stock be returned to said company. The plaintiff did not ratify said distribution of said stock and is not estopped from bringing this action."

Plaintiff had judgment on the findings, from which judgment defendants appeal.

For the appellants there was a brief by *Martin, Martin & Martin,* and oral argument by *Joseph F. Martin* and *Gerald F. Clifford,* all of Green Bay.

For the respondent there was a brief by *John A. Kittell*

and *Greene, Fairchild, North, Parker & McGillan* of Green Bay, and oral argument by *Mr. Kittell* and *Mr. J. R. North.*

The following opinions were filed June 25, 1919:

ROSENBERRY, J. Plaintiff contends that the judgment should be sustained on three grounds: (1) that the transaction by which the stock of the Crivitz Company was distributed to the stockholders of the defendant company was the result of the mistake of all parties concerned; (2) that the corporation had no power to declare a dividend payable in anything but money or its own stock; (3) that plaintiff is not estopped to bring this action and has not ratified the transaction which resulted in the distribution of the Crivitz Company stock.

While the trial court did not specifically find that the distribution of the stock of the Crivitz Company was the result of a mutual mistake, it did find that such distribution was inimical to the interests of the defendant company and counter to and destructive of the purpose for which the stock was acquired by the defendant company. The meeting had under consideration how the stock of the Crivitz Company should be handled to carry out the object of the defendant company in purchasing it. It appears without dispute that but two alternatives were presented to the stockholders of the defendant company with reference to the stock of the Crivitz Company: first, that the assets of the Crivitz Company should be conveyed to the defendant company and the Crivitz Company should cease to do business; and second, that the stock should be distributed *pro rata* to the stockholders of the defendant company so that the defendant company would in effect remain in control of the Crivitz Company. That the defendant company as a corporation has lost control of the Crivitz Pulp & Paper Company is perfectly plain.

The provisions of sec. 1776*a*, Stats., wherein it is pro-

vided that when one corporation holds stock in another the president of the holding corporation may be authorized to vote the stock of the corporation which it owns and that its directors may qualify as directors of such owned corporation, were not called to the attention of the plaintiff or other stockholders of the defendant company. The proceedings by the stockholders of the defendant company which resulted in the distribution of the stock of the Crivitz Company were consented to upon the mistaken supposition that the transaction when completed would leave the defendant company in control of the Crivitz Company.

It is said that equity, in the absence of fraud, cannot grant relief for a mistake of law. A mistake of law, however, does not always bar equitable relief. The rule has been stated thus:

"Where there is a mutual mistake, either of fact in the making of a contract, or of law or fact in the reduction of the contract to writing, the person injured thereby may have it reformed in equity in accordance with the truth, in the absence of facts or circumstances constituting a waiver of the remedy or an estoppel to the assertion of it." *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 617, 618, 76 N. W. 777. See 10 Ruling Case Law, pp. 304–316, §§ 48–59.

In this case the stockholders had a common declared purpose; that was that the defendant company should acquire the Crivitz Company so as to control its supply of raw material. The stock of the Crivitz Company was purchased for that purpose. The arrangement entered into was made to effectuate that purpose. Through mistake the proceedings did not accomplish that purpose. There is no reason, under such circumstances, why equity should not grant relief to a stockholder of a corporation as well as in a like case in the making of a contract.

Sec. 1765, Stats., provides:

"Any corporation which has invested or may invest its net earnings or income or any part thereof in permanent

additions to its property or whose property shall have increased in value, may lawfully declare a dividend payable to stockholders upon its capital either in money or in stock to the extent of the net earnings or income so invested or of the said increase in the value of its property."

No dividend was declared in this case. No attempt was made to meet a dividend obligation by the transfer of the stock of the Crivitz Company. What actually took place was a distribution of the assets of the defendant company. There was no special meeting called for the purpose of making such distribution, but all of the stockholders of the company were present, participated in the proceeding, and assented thereto. No questions were raised involving the right of the state, creditors, or third parties to object. Under such circumstances we think it is within the power of the stockholders of a corporation to make such distribution of its assets as was made in this case. At least no stockholder consenting thereto and participating therein and receiving his *pro rata* share of the distributed assets can object thereto on the ground that the act is *ultra vires.*

The finding of the trial court to the effect that the plaintiff had not ratified the distribution and is not estopped from maintaining this action is in accord with the clear preponderance of the evidence. Almost immediately upon discovering the true character of the transaction in which she was a participant the plaintiff tendered back the stock which she had received and demanded of the officers of the defendant company that they bring an action to restore the distributed stock to the treasury of the defendant company. In the meantime the situation remained unchanged. She did nothing after discovering the mistake to ratify or confirm the transaction.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). It having been determined by the trial court that the stockholders of the *John Hoberg Company* did direct the distribution of the Crivitz

Company stock and by this court that such action was lawful, I can see no foundation in fact or law for the judgment herein. In what particular manner the holding of the Crivitz Company stock by the stockholders of the *Hoberg Company* rather than by the corporation itself is inimical to the best interests of the *Hoberg Company* is not pointed out. In either event the property of the Crivitz Company is subject to lawful control, disposition, or sale by the holders of the majority of the stock represented by the directors. It is immaterial whether such be directors and stockholders of the Crivitz Company or of the *Hoberg Company.* They are the same individuals.

The intention, impliedly at least, suggested by the judgment as having been present and controlling at the time of the purchase of the Crivitz Company stock with the funds of the *Hoberg Company,* that the Crivitz Company property should be held continually as a source of supply for the *Hoberg Company,* could not be perpetuated by any form of judgment either in a suit in the present form or by a stockholder of the *Hoberg Company* if there had been no such distribution. Being part of the assets of the *Hoberg Company* it could be lawfully disposed of in the lawful discretion of the directors, and the court would be powerless to interfere. Sec. 1775, Stats.; *Werle v. Northwestern F. & S. Co.* 125 Wis. 534, 540, 104 N. W. 743; *J. H. Lane & Co. v. Maple C. Mills,* 226 Fed. 692, 697.

There is no suggestion of a showing that anything is threatened to be done or intended to be done by the holders of the distributed stock of the Crivitz Company that would be harmful to the interests of the individuals concerned as stockholders in either company, and much less anything intended or threatened to be done by the holders of the Crivitz Company stock as it was distributed that could not lawfully be done by the same individuals holding the same proportionate interest in the *Hoberg Company.*

That the plaintiff herself might have been mistaken as to the effect of what was done would not of course be sufficient to grant her any relief. *Grant M. Co. v. Abbot,* 142 Wis. 279, 288, 124 N. W. 264. The court below did not find that there was any mutual mistake. It could not have been a mutual mistake of fact because the plaintiff and several others testified that there was no such action at all, others that there was, and the court found that there was such action taken at the meeting. It could hardly be a mutual mistake as to the law, for some at least of those interested understood that the effect of these proceedings would be to lawfully distribute the stock of the Crivitz Company among the stockholders of the *Hoberg Company,* and this court now holds that such action could be lawfully done, so they at least were not mistaken as to the legality of the transaction.

Finally, I think the plaintiff was completely estopped from getting the relief that has been granted to her. She participated in the meeting in which it was done, she signed a consent, with the others, as stockholders of the Crivitz Company recognizing their proportionate interest in the same and providing for the election of directors, and she participated in the election of directors, and by such directors her husband was elected manager of the Crivitz Company.

I think the judgment should be reversed and the action dismissed.

OWEN, J., dissents.

The following opinion was filed November 4, 1919:

PER CURIAM. The appellants move for a rehearing upon four grounds: 1. There was no finding of the trial court of any mistake of law on the part of the parties to this action. 2. The assumption by this court of the existence

of a mistake of law was contrary to a fair preponderance of the evidence. 3. The alleged mistake of law was not such as should be the basis for equitable relief. 4. The court erroneously assumed that the plaintiff at once brought action to compel a retransfer of this stock.

Upon a re-study of this case on the motion for a rehearing the court is of the opinion that the mandate should be modified to read as follows: The judgment appealed from is reversed and the case remanded, and if the plaintiff so elects there shall be a new trial upon the question of whether or not there was such a mutual mistake on the part of the parties to this action as would entitle the plaintiff to have the transfer of the stock of the Crivitz Pulp & Paper Company set aside or the stock retransferred to the *John Hoberg Company*. If the plaintiff shall not, within sixty days from the filing of the *remittitur* in the trial court, elect to have a new trial, the complaint shall be dismissed.

ESCHWEILER, J., dissents.

TOMLINSON and another, Appellants, vs. ASHLAND COUNTY, Respondent.

May 28—November 4, 1919.

Counties: Contract to erect courthouse: Power of architect: Implied contract: Doing work under protest: Failure to procure architect's certificate: Right to recover: Presentation of claim: Interest: Delayed payments.

1. Under a contract for the erection of a courthouse the plaintiffs were not bound to furnish at their own expense, as a part of their contract obligation, sand and labor for necessary inside and outside filling, where the plans and specifications failed to disclose these items and they were not within the

contemplation of the parties at the time of making of the agreement.

2. While the architects had the power to construe and define the intent and meaning of the plans and specifications made a part of the contract concerning all work within the contract, they had no power to construe the contract itself and determine what work was within or without the contract.
3. Where the insistence by the defendant county, through its building committee and architects, that the work in question should be done by the plaintiffs as part of their contract required the plaintiffs to proceed with the work as they did or to refuse to proceed at all, thereby subjecting themselves and the county to damages and delay, a situation was created under which there arose an implied obligation on the part of the county to pay for the work.
4. Failure of the architects, based on their mistaken view of the law, to give the certificates specified in the contract for the erection of the courthouse, is no bar to the contractors' right to recover.
5. Where a claim of the plaintiff contractors not intended to be rejected was properly a part of another claim with which it was mingled at the time the bill was presented, and the building committee of the defendant county rejected the entire bill, part of which should have been allowed, the claim not intended to be rejected cannot be defeated on the ground that it had never been properly presented to the county board for allowance.
6. Where the delay in issuing the final certificate of the architects and making final payment was not chargeable to any breach of the contract obligation on the part of the defendant county, the plaintiff contractors were not entitled to interest on the final and delayed payment on the contract price.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Reversed.*

On February 10, 1914, the county board of defendant by due resolution appointed a building committee and authorized the issue of bonds for the erection of a courthouse in the city of Ashland. February 21st a contract was duly made with architects Buemming of Milwaukee, Wisconsin, and Wildhagen of Ashland, by which, among other things, the said architects were required "to furnish complete plans

and specifications . . . in such shape that the owner may advertise for bids thereon for the erection of said courthouse."

Such prepared plans and specifications were submitted to bidders under a general advertisement or notice which contained the following provision: "All bids must be in strict accordance with the plans and specifications prepared by H. W. Buemming and Henry Wildhagen." The building was to be erected upon a square block, the surface of which sloped from the south to the north with a difference in level of eight feet. The exact position upon said lot had not been determined upon, however, at the time the bids were received.

The plaintiffs were residents of Ashland and familiar with the location of the block on which the building was proposed to be erected. Prior to their submitting their bid for the doing of certain of the work plaintiffs called the attention of the Ashland architect to the fact that the plans as prepared, particularly so far as related to the height of certain columns or piers in the same, could not be adjusted in accordance therewith to the actual slope of the ground, for if all the columns or piers were to be of the length as marked on the plans they could not all rest upon the surface. Thereupon a change was made in the plans indicating that certain of the columns or piers were to be of greater length than originally indicated, but no reference was made in such changed plan or notice of the difference in the elevation of the surface soil or that any filling of material in or around the building would be thereby rendered necessary.

Plaintiffs and other bidders discussed with the architects, prior to submitting bids, the question of whether or not they would be required, under the mason work, to haul in any ground or soil for the purpose of making any filling either within the walls of the building or outside them, and after such discussion and being informed by the architect that in his judgment the county would furnish the material for the

filling, at least for the outside, they made no provision in their bid for any expense for bringing material from the outside of the lot to raise the surface of the ground above its then level.

Plaintiffs submitted their bid, and attached to the bottom thereof was written as follows: "The above bid is based on the understanding that the excavated earth from the building will be sufficient to do all filling." This note was brought to the attention of at least one of the members of the building committee of the defendant and to the attention of the architect. It was detached, however, either at the time the bid was presented or just prior to the time when the contract was let to the plaintiffs.

A contract was made with the plaintiffs on June 9, 1914, the material parts of which are as follows:

"Art. I. The contractors shall and will provide all the materials and perform all the work for the entire structural steel and iron work, fire-proofing, cut-stone work, mason work, lathing and plastering, ornamental iron work, carpenter work, galvanized iron, tin, copper, and roofing work, and painting and glazing of and for a courthouse building to be built at Ashland, Wisconsin, as specified on pages 5 to 29, inclusive, of specifications and including also work described on sheet 'A,' herewith attached and made a part of this contract, all as shown on the drawings and described in the specifications prepared by H. W. Buemming, Henry Wildhagen, associated architects, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

"Art. II. It is understood and agreed by and between the parties that the work included in this contract is to be done under the direction of the said architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. . . .

"Art. III. No alterations shall be made in work except upon written order of the owner and the architect; the amount to be paid by the owner or allowed by the contractors by virtue of such alterations to be stated in said order.

Should the owner and contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree the determination of said amount shall be referred to arbitration, as provided for in art. XII of this contract. . . .

"Art. VIII. The owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the contractors, agrees that it will reimburse the contractors for such loss. . . . Should the owner and contractors fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in art. XII of this contract. . . . The final payment shall be made within thirty days after the completion and acceptance of the work included in this contract, and all payments shall be due when certificates for the same are issued."

The specifications referred to in and made a part of the contract contained the following provisions:

"*Grading:* The entire lot, which is 300 x 300 feet in size, is to be graded so as to bring the top grade of same one foot above the sidewalk grade of Second street, within a radius of twenty feet all around the outside walls of building. All soil from the excavations is to be left on the premises and leveled out as directed.

"The filling around the building is to be completed before November 1, 1914.

"*Excavations:* The entire top soil for the entire area of ground floor shall be plowed and scraped off down to solid clay. The entire area of ground floor is then to be filled in with clay, sand, or cinders, to the proper level, well tamped, and rolled down with a steam roller to a true and level surface, ready for the concrete foundation of ground floor.

"*General conditions:* The contractor for this work will be subject to the 'General Conditions' forming the preface of this specification, in so far as the same are applicable to this branch of the work. . . . He will be required to do all work belonging to his branch, whether mentioned in his respective specification or elsewhere. The county of *Ashland* will not be liable for any extra work unless the same shall first be

duly ordered in writing by the courthouse building committee at an agreed price. . . . Any work or materials not directly or indirectly noted in the specification or drawings, but necessary for the proper carrying out of the obvious intentions thereof, are to be understood as implied, and must be provided by the contractor.

"*Alterations:* The courthouse building committee reserves the right to make any change in the plans and specifications which it may deem necessary or desirable and the several contractors shall furnish the additional material and do the extra work necessitated by such changes at fair and reasonable prices, said price to be agreed upon by the courthouse building committee and the said contractors respectively before the work is commenced. The county of *Ashland* shall not be liable for any extra work, unless the same shall be duly ordered in writing by the said committee. If the changes herein mentioned shall diminish the amount of work to be performed or materials to be furnished, the amount of the same at a fair and reasonable value shall be deducted from the contract price.

"On or before the 5th day of each calendar month each contractor must deliver to said courthouse building committee a written statement of the amount of his claims, if any, for such additional or extra work and material furnished during the previous month. The nondelivery of such bill or account at the stated time will be considered as an abandonment of any claims for the value of such work and as exonerating the county of *Ashland* from all liability relative thereto.

"*Architects and their duties:* H. W. Buemming, Milwaukee, Wisconsin, and Henry Wildhagen, Ashland, Wisconsin, associated architects, are the architects and superintendents of this work for and in behalf of the county of *Ashland.* Their duties consist in giving the true interpretation and meaning of the plans and specification, at the same time taking particular care that all work and materials shall be, in all respects, according to the said plans and specification. They have no authority to make any changes in the said plans and specification, nor to order any additional or extra work, that power being reserved to the courthouse building committee alone. (See 'Alterations.') They shall give any and all certificates that the contractor may

become entitled to from time to time, and shall settle, in conjunction with the courthouse building committee, all the deductions from or additions to the contract price which may grow out of any changes or alterations in the work. They shall also determine, in conjunction with the courthouse building committee, the damages which may accrue from any cause, and shall decide upon the fitness of all materials used and work done. The courthouse building committee and architects' opinions, certificates, reports, and decisions on all matters pertaining to the construction of this building shall be binding and conclusive."

After the contract was let the site of the proposed building was located in about the center of the block. Owing to the fact that the site selected had formerly been occupied by other buildings, there were old vaults, tank holes that had filled up, and cellars, etc.; thereupon the architect, with the knowledge and consent of the building committee, gave a so-called work order in writing to the plaintiffs to fill up such holes with sand. Plaintiffs did so, and, as the court found, 400 cubic yards of earth were required to comply with such order, and the reasonable value of it was $335.50. It was substantially completed during the month of July.

In addition to the supervision by the architects, the building committee employed a Mr. Foster to be constantly on the ground and keep account of the way in which the work was progressing and make daily reports thereof to the building committee and the architects. Foster kept account of the amount of work that was done and material furnished under such work order, and furnished his estimate or record thereof to the plaintiffs shortly after the 1st of August. On August 10th the plaintiffs presented a bill to the building committee which was as follows:

To extra concrete and excavating—		
82 yards concrete footings at $6.....	$492 00	
25 yards concrete piers at $12.....	300 00	
59 yards concrete walls at $8.....	472 00	
191 yards excavating for walls and trenches	191 00	$1,455 00

Extra bill.

To excavating old fills and hauling rubbish—		
671½ hours at 20c.....	$134 30	
222½ hours at 22½c.....	50 07	
7 hours at 15c.....	1 05	
8 hours at 80c.....	6 40	
80 hours at 25c.....	20 00	
140 hours teams at 50c.....	70 00	
Liability insurance on $211.82 at $6.47.	13 70	
	$295 52	
10 per cent.....	29 55	
		$325 07
Filling interior of building with sand—		
1,950 yards sand filling at 62½c.....	$1,218 75	
J. F. Brindle, placing teams.....	25 00	
Sand tickets	6 50	
42½ hours team towing at building at 50c	21 25	
Labor spreading sand.....	107 87	1,379 37
Labor at sand-pit stripping—		
140 hours at 22½c.....	31 50	
80 hours teams at 50c.....	40 00	
		71 50
Total cost of filling basement....	$1,450 87	
10 per cent.....		145 08
		$3,376 02

A dispute then arising as to whether or not the last items of such bills for filling interior of building should be allowed, the architects reported adversely thereto and were upheld by the building committee. Thereupon a new bill was submitted as of the same date of the first items, slightly modified, with the second one, and a certificate was issued by the architects September 9th and plaintiffs were paid for these two.

The plaintiffs finished their part of the work substantially about the last of October, except as to certain hardware and fixtures that were to be placed by them in the building but to be furnished by the county. Some delay arose in so furnishing such hardware and the plaintiffs were not entirely through until December, 1915, or early in January,

1916. The final certificates were given by the architects in January and plaintiffs received payment thereof.

Various proceedings were had before the county board with reference to the claims of the plaintiffs, and, upon the refusal of the county to pay the items hereinafter specified, separate appeals were taken to the circuit court and there the two claims were consolidated and tried as one case. The court found the facts substantially as above stated and also the following as to the several items:

(a) For 400 cubic yards of sand filling, $335.50; that it was required by and furnished under written order, and that $335.50 was a reasonable and proper amount. That it was included in but not specifically separated from the 1,950 cubic yards specified in the rejected items, and the fact that it was made under written order was not called to the attention of the architects, building committee, or county board until after this action was commenced; and that in refusing payment for the 1,950 yards they did not intend to refuse payment for the 400 yards, but, inasmuch as it had never been properly submitted, it could not now be allowed.

(b) Claim for sand brought by plaintiffs within the walls of the building to bring the level of the ground up to within six inches of the floor as laid, and amounting to $1,272.27. The court found this to be the reasonable value of the material furnished, and also found that the contract seemed to contemplate that the contractors should furnish this filling, and that the decision of the architects to that effect of the meaning of the plans and specifications was conclusive against the plaintiffs.

(c) Claim for sand or material used in filling in around outside the building to the amount of $2,120.35. The court found that this was the reasonable value of the material furnished. That under the contract the duty of furnishing it was imposed upon the contractors, and the determination of the architects to that effect was binding upon the plaintiffs. He also found with reference to these last two items of

filling that there was not sufficient earth upon the block made by the excavations or otherwise to bring the grade up to that established by the plans and specifications, and that such fact was not in the minds of the architects when they drew the plans and specifications nor in the minds of the committee when the contract was let; that when the decision was made by the architects and the building committee to the effect that such filling was required of the plaintiffs by reason of the contract, plans, and specifications, the plaintiffs protested against such decision and asked for arbitration thereon, which request was never acted upon by the committee or the county board.

(d) Claim for interest as measure of damages for delay from October, 1915, to February, 1916. The court found $252.68 to be the amount of such interest, but that plaintiffs were not entitled to recover the same.

Upon the findings judgment was entered in favor of the defendant dismissing the action with costs, and from such judgment plaintiffs have appealed.

For the appellants there were briefs by *Sanborn, Lamoreux & Pray,* and oral argument by *Allan T. Pray* and *A. W. Sanborn,* all of Ashland.

William F. Shea of Ashland, for the respondent.

The following opinion was filed June 25, 1919:

ESCHWEILER, J. Seemingly the only obstacle found by the court below to prevent the allowance to the plaintiffs of the two items for inside and outside filling, of $1,272.27 and $2,120.35 respectively, was the conclusion he came to that under the contract and under the decision of the architects to the same effect, and which he held was controlling, the plaintiffs were bound to furnish this sand and labor for these two respective items at their own cost and as a part of their contract obligations.

The contract liability of plaintiffs was bound up with and measured by the plans and specifications by the express pro-

visions of the contract itself. These plans and specifications had been made the foundation for the bids requested under the express terms of the advertisement and thereafter accepted.

These plans and specifications not only failed to disclose that such items were intended or provided for, but, as reasonably and generally construed, declared to the contrary. Nor is there to be found in any of the language of the contract or of the specifications, either in the provisions as to grading, filling, or in any of the general provisions quoted in the statement of facts, such terms as placed, either expressly or by implication, such conditions within the contract. The plaintiffs were entitled to rely upon what was in effect represented by such plans and specifications. *Christie v. United States,* 237 U. S. 234, 242, 35 Sup. Ct. 565.

It is further apparent that it was not within the contemplation of the parties at the time of the making of the contract that what was covered by two such items was any part of that for which they were to be paid the contract price.

The power of the architects under the contract was unquestionably binding when deciding questions arising as to the meaning of the provisions of the plans and specifications concerning all work that was within the contract, but they were not given the power expressly, nor may we give it to them by implication, to either add to or take away from the contractual rights or liabilities of either party under the contract itself.

The power to construe and define the intent and meaning of plans and specifications made a part of a contract is one thing, and may properly be, as it was in this instance, left to arbiters selected by the parties; the power to construe the contract itself and to determine what is within and what without such contract is a different and independent question, and belongs primarily to the courts. This distinction

was recognized in *First S. & T. Co. v. Milwaukee Co.* 158 Wis. 207, 237, 148 N. W. 22, 1093. See, also, *Ætna Ind. Co. v. Waters,* 110 Md. 673, 691, 73 Atl. 712; *Isaacs v. Dawson,* 70 App. Div. 232, 75 N. Y. Supp. 37; affirmed, 174 N. Y. 537, 66 N. E. 1100.

To give the latter power to those who may properly be and usually are vested with the first should rest upon express grant rather than upon mere implication. *Ruch v. York,* 233 Pa. St. 36, 52, 81 Atl. 891; *Mayor, etc. v. M. A. Talbott & Co.* 120 Md. 354, 363, 87 Atl. 941.

The insistence by defendant, through the building committee and the architects, that the work in question must be done by plaintiffs as a part of their entire contract, required the plaintiffs to either proceed with the work as they did or to refuse to proceed at all, thereby subjecting themselves and the county to great damage and delay, and was in effect compelling the plaintiffs to do that which they were not bound to do. Such situation and the work having been done by the plaintiffs under protest against just such a construction as was being given to the contract; the knowledge on the part of all concerned that the work was being so done and it having been done in good faith and a reasonable amount only having been charged for it—all these conditions created a situation under which there arose an implied obligation on the part of the county to pay for such work. 13 Corp. Jur. 245; *Molloy v. Liebe,* 102 L. T. Rep. N. S. 616.

The construction, therefore, by the architects of the questions involved as to the right of the plaintiffs to charge for and recover for these two items, being an attempted decision on their part on a matter that was beyond their jurisdiction, is not binding on the parties nor controlling on the court. *Shine v. Hagemeister R. Co.* 169 Wis. 343, 172 N. W. 750. And as is held in the case last cited, the failure on the part of the architects to give the certificate specified in the con-

tract for these two items, such refusal being based upon their mistaken view of the law, is no bar to the plaintiffs' right to recover.

The item of $335.50 for 400 cubic yards of sand was disallowed by the circuit court on the ground that it had never been properly presented to the county board for allowance. Apparently a misunderstanding arose with reference to this item. These 400 cubic yards, with the 1,550 cubic yards covered in the first item above, which, we have seen, should have been allowed, were needed for filling inside the building. It was in exactly the same position under the contract as was the 1,550 yards, except that as to these 400 yards the architects and the building committee had recognized that much, at least, of the inside filling was proper as an extra and had given a written order therefor. This, however, did not deprive plaintiffs of whatever rights they might have with reference to it by virtue of its being necessarily a part of the entire inside filling. It is conceded that it is a reasonable, just, and honest claim and that it was not intended to have been rejected by the architects or the building committee. It can be and should be properly allowed on the same basis and as a part of the item of inside filling with which it was mingled at the time the bill for such inside filling was presented to the building committee and rejected, and should therefore be allowed. It is therefore not necessary to determine whether or not its presentation as such an extra claim under the written order was properly made or not.

The court below was right in disallowing the claim of $252.68 computed as interest from November 1, 1915, to February 1, 1916, on the final and delayed payment to plaintiffs on the contract price. The contract provided for the manner in which the plaintiffs were to receive their pay and the times therefor. We find nothing in the record which would properly support a finding that the delay, if any, in the issuing of the final certificate and the making of the final

payment was chargeable to any breach of the contract obligation on the part of the defendant. Some delay is inevitable between the finishing of the work and the issuing of the certificate for the same and such must be within the contemplation of the parties to such contracts.

It follows that the plaintiffs should be allowed judgment for the sum of the three items of $335.50, $1,272.27, and $2,120.35 respectively, aggregating $3,728.12, so disallowed by the court, together with interest thereon from the date of the filing of the claims with the county board.

By the Court.—Judgment reversed, and the cause remanded with direction to enter judgment for the plaintiffs in the sum of $3,728.12, with interest.

A motion for a rehearing was denied, with $25 costs, on November 4, 1919.

FRANKE, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

May 31—November 4, 1919.

Railroads: Federal control: Authority of director general: Actions.

Under sec. 10 of the federal railroad control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), authorizing actions to be brought against carriers as then provided by law, an action could be brought against a carrier in its corporate name; and General Order No. 50 of the director general of railroads, requiring actions to be brought against the director general, is therefore invalid, the legislative declaration being the paramount authority.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

February 20, 1918, the plaintiff at Minneapolis, Minnesota, delivered to the defendant, *Chicago & Northwestern*

Railway Company, a carload of corn for transportation to Werley, Wisconsin, and for delivery to one Ketterer upon payment by him of a draft attached to the bill of lading covering and issued at the time of shipment by said defendant.

The complaint further alleged that in breach of such duty the defendant delivered the car to Ketterer without presentation or payment of the draft or bill of lading and that thereafter the said Ketterer refused to pay the draft or to retain possession of the car and its contents and turned the same back to the defendant. That defendant thereupon converted the contents of the car and sold and disposed of the same and retained the money received therefrom. That the value was $1,714.40, and that demand has been made upon the defendant for payment of such value. For its refusal and neglect to pay plaintiff commenced this action in November, 1918.

The defendant duly appeared, and after receipt of plaintiff's complaint moved the court below for an order dismissing the action as to the defendant, *Chicago & Northwestern Railway Company,* and substituting therefor as defendant William G. McAdoo, director general of railroads. This motion was based upon the affidavit of defendant's attorney setting forth the Presidential proclamations of December 26, 1917, and April 11, 1918, the possession by the President of the United States of the principal railroad transportation systems of this country, including the defendant, and the appointment of William G. McAdoo as director general. It referred also to the federal control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), and attached and made a part of the affidavit what is known as General Order No. 50, issued by William G. McAdoo as director general of railroads on October 28, 1918.

Upon the hearing and on December 19, 1918, the court below made an order dismissing the action as to the defendant, *Chicago & Northwestern Railway Company,* and di-

recting that the summons and complaint be amended by substituting William G. McAdoo, director general of railroads, as the sole party defendant in lieu of the *Chicago & Northwestern Railway Company.*

From such order the plaintiff has appealed.

The portions of the federal control act and of the general order which we deem necessary to print as a part of this case are as follows:

Act of March 21, 1918.

"The Federal Control of Railroads Bill.

"...

"Sec. 9. That the provisions of the act entitled 'An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this act shall also apply to any carriers to which federal control may be hereafter extended.

"Sec. 10. That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of

such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control.

"That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the interstate commerce commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination. . . .

"Sec. 12. That moneys and other property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before federal control and for such purposes as under the interstate commerce commission classification of accounts in force on December twenty-seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with federal control as the President may direct, . . ."

General Order No. 50,

By William G. McAdoo, director general of railroads, on October 28, 1918.

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the director general of railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the director general of railroads, which action, suit or proceeding but for federal control, might have been brought against the carrier company, shall be brought against William G.

McAdoo, director general of railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

"Subject to the provisions of general orders numbered 18, 18—A, and 26, heretofore issued by the director general of railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the director general of railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"The pleadings in all such actions at law, suits in equity or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the director general of railroads for the carrier company as party defendant and dismissing the company therefrom.

"The undersigned director general of railroads is acting herein by authority of the President for and on behalf of the United States of America; . . ."

William E. Burke of Milwaukee, for the appellant.

R. N. Van Doren of Milwaukee, for the respondent.

The following opinion was filed June 25, 1919:

ESCHWEILER, J. The power and authority of Mr. McAdoo as director general of railroads cannot exceed that which can be lawfully vested in him by proclamation or order of the President, and he in turn receives his power and authority over the subject matter here concerned by and through the legislative declaration embodied in the federal control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25). Whatever general language is used in this act conferring power on the President must be construed to be given for the purpose of enabling him to carry out the provisions of the act and not to enable him, either by him-

self or by any appointee of his, to set aside any provisions of the legislative will or to take away any rights or privileges granted to or recognized as validly existing in third persons by such legislation.

When Congress, in sec. 10 of that act, used the following language, "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government," it either granted or recognized as then lawfully existing the right to or of any person situated as was the plaintiff herein to bring just such a cause of action against a defendant such as the *Chicago & Northwestern Railway Company.* Such rights so granted or recognized cannot be taken away or destroyed except by Congress.

We find no language in this act itself which warrants the conclusion that what was so expressly given or recognized by the quoted language above as a substantial right was to be destroyed or taken away by implication.

This provision of sec. 10 of the federal act and provisions of General Order No. 50 issued by the director general of railroads and upon which the court below based its order, cannot both stand. The legislative declaration is the paramount authority and must control.

By the Court.—Order reversed.

SIEBECKER, KERWIN, and VINJE, JJ., dissent.

A motion for a rehearing was denied, with $25 costs, on November 4, 1919.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant, vs. CITY OF MILWAUKEE, Respondent.

June 2—November 4, 1919.

Eminent domain: Change in grade of street a taking for railroad purposes: Liability of city to railroad company for damages to its property by such change.

1. The raising or lowering of the surface of a city street pursuant to an order of the railroad commission under sec. 1797—12*e*, Stats., which directed separation of the railroad and street grades, in legal effect is not a mere change of grade by the municipal government, but a taking of land for railroad purposes by the railroad company, though a street grade has not been previously established and worked up to, and though the railroad commission directs that the city be responsible for damages to adjacent property. KERWIN, OWEN, and ESCHWEILER, JJ., dissent.
2. Notwithstanding an order of the railroad commission that the city assume responsibility for damages to adjacent property caused by the issuance or enforcement of said order, the city is not liable to the railroad company for damages to its freight houses resulting from the change of grade, because the order of the commission creates no new liabilities, but simply places on the city the duty of discharging a liability already existing, and there is no liability already existing when a railroad company condemns its own property for railroad purposes. KERWIN, OWEN, and ESCHWEILER, JJ., dissent.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to a complaint. The complaint alleged in substance that in response to a petition filed with the railroad commission by the city of *Milwaukee* in February, 1910, said commission on the 20th day of May, 1912 (pursuant to the provisions of sec. 1797—12*e*, Stats. 1911), made an order for the separation of the railroad and street grades on certain streets in the city of *Milwaukee* and directed that the Milwaukee Electric Railway & Light Company should do

the necessary grading and paving and make all necessary changes in that part of the roadway of the streets included between the outside rails of its tracks and one foot wide on each side thereof; the plaintiff all the work lying within the limits of its right of way and also the work in the public thoroughfares except that part laid on the Electric Railway & Light Company; and the city all the work not laid on the two companies, as well as assume responsibility for any alleged damages to adjacent property or business caused by the issuance or enforcement of the order. The complaint further alleged that by said order and the enforcement thereof the plaintiff's tracks as well as the whole of West Water street for some distance immediately north of the Menominee river were elevated about two and one-half feet, thereby making useless certain freight houses located upon property owned by the plaintiff fronting on said raised portion of West Water street and thus damaging the plaintiff in the sum of over $19,000, for which sum judgment is demanded. The complaint contained no allegation that there had ever been a grade established on the portion of West Water street so raised or that the street had ever been actually graded to such grade.

C. H. Van Alstine and *H. J. Killilea,* both of Milwaukee, for the appellant.

For the respondent there was a brief by *Clifton Williams,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.*

WINSLOW, C. J. Two contentions are made by the respondent in support of the order of the trial court, namely: (1) the order of the commission was merely an order changing the grade of the street, and, there being no allegation that the street had previously been brought to any established grade, there is no liability; (2) if the order be construed not as an order changing the grade, but as an

order condemning land for railway purposes, then there is no liability because the railroad company cannot collect damages of the city resulting from condemning its own property. The trial judge in sustaining the demurrer based his conclusion on the first proposition and did not pass on the second. The two propositions will be briefly considered.

1. The question whether the raising or lowering of the surface of a city street resulting from the separation of railroad and street grades is in legal effect a change of grade by the municipal government, or a taking of land for railway purposes by the railway company, was met and squarely decided in the case of *Pabst B. Co. v. Milwaukee,* 157 Wis. 158, 147 N. W. 46. It was there held that it was a taking of land by the railway company for railway purposes, and it was further held that the city of *Milwaukee* had no power under its charter to change the grade of a street in order to enable a railway company to maintain its tracks in or across the street, for the reason that this was taking of land for railway purposes. This ruling was expressly reaffirmed in *Eisler v. C., M. & St. P. R. Co.* 163 Wis. 86, 157 N. W. 534. It was made after very careful study and with appreciation of its great importance and we see no good reason for disturbing it now. It commends itself to our reason now as it did then, and we adhere to it. The application of that rule to the present case results necessarily in rejection of the city's claim that this was a mere municipal change of grade for which, under the rule stated in *Walish v. Milwaukee,* 95 Wis. 16, 69 N. W. 818, no damages would accrue to adjoining property owners, because the complaint does not allege the previous establishment of a grade and the actual grading of the street to such grade.

It is true that in both of the cases cited it appeared that there had been such previously established grade actually worked up to, but it is entirely certain that this fact cut no figure with the decision. Plainly it could not. If the act

was a taking for railway purposes in case of a street with an established grade, it must be just as much so in the case of a street or highway where no legal grade has been established. It cannot assume the form of a mere municipal improvement on one street and a railway taking on the next, depending on whether a grade has previously been established and worked up to or not. Such a rule would be absurd.

It is true, also, that in the cases cited the proceedings were begun before the enactment of ch. 540, Laws 1909 (secs. 1797—12*e*, 1797—12*f*, Stats. 1917), authorizing the railroad commission to order separation of grades, which is the chapter under which the proceedings in the present case are brought, but were begun and carried to completion under the provisions of the *Milwaukee* charter. That fact, however, only makes the cases stronger authority for the proposition that the taking for grade-separation purposes is always a railroad taking, for in those cases the city had actually passed an ordinance formally changing the grade, whereas in the present case there has been no action by the city, but the change was made by the railroad commission in the course of the proceedings to separate the grades. In legal effect, the proceedings in those cases and the proceedings under the railroad commission law, used in the present case, are essentially the same. If the change of grade is a railroad taking in one case it is necessarily so in the other. It is significant also to note that the legislature in passing ch. 540, Laws 1909 (secs. 1797—12*e*, 1797—12*f*, Stats. 1917), provided that railroad companies might take land by condemnation for the purposes of the law, thus indicating that the legislative idea as to the character of the act agreed with the idea of the court as expressed in the *Pabst B. Co. Case.*

The case of *Henry v. La Crosse,* 165 Wis. 625, 162 N. W. 174, is much relied upon to sustain the contention now under

discussion, but it seems very plain to us that it does not do so. In that case no railroad was raised or lowered and no actual change made in the street for railroad purposes; the separation of grades had been made in 1883 and the grade of a certain viaduct over the railroad then established. The approaches of the viaduct then built, however, did not come up to the established grade, and the railroad commission in ordering the building of a new viaduct required that the approaches be brought up to the grade established in 1883. The case was decided in the trial court and in this court on the ground that there had been in legal effect no change in the street, but simply a bringing of the street up to the grade established in 1883. The decision was plainly right, but just as plainly it does not affect this case.

It is suggested that, because the railroad commission directed that the city be responsible for damages to adjacent property resulting from the change in the surface of the street, the change becomes in legal effect a change of grade by the municipality. The suggestion is not without some weight, but we are satisfied that it cannot prevail. Reference to the statute (sub. 2, sec. 1797—12*e*) shows that the legislative idea was that the costs of the whole work, including damages for land actually taken and damages for change of grades, should be aggregated and that a certain proportion of such aggregate sum which the railway company or companies and the municipality should each bear should be fixed. In the present case certain parts of the work were parceled out to each of the parties. We do not intimate or hold that this affected the legality of the proceeding; we do not think it did; but we refer to the fact that the statute speaks of the proportion of a gross sum simply to show that the requirement of the commission that the city pay the damages to adjacent property owners must logically be construed as simply the means used by the commission to determine the city's proportion of the gross sum, and not as a

requirement that the city pay such damages *as damages* because of any liability therefor. It amounts to no more than as if the commission had directed that the city pay ten per cent. of the gross sum and it turned out in the end that the damages to property owners amounted to just ten per cent.

2. The second contention made by the city must, however, be sustained. The real estate taken is the real estate of the railway company. The order of the commission to the effect that the city assume responsibility for alleged damages to adjacent property did not create any liability not theretofore existing. *Henry v. La Crosse, supra.* When property is taken for railroad purposes the only liability created is the liability to make compensation for it, and that is a liability of the railroad company which does the taking. But when a railway company takes its own property for railway purposes it seems absurd to speak of there being any liability to pay for it. Paying for it would simply be taking the money out of one pocket and putting it in another. But the city only assumes responsibility for liabilities existing by reason of the taking for railroad purposes, and as there is no such real liability so far as the property in question is concerned there is no liability assumed.

By the Court.—Order affirmed.

KERWIN, J. (*concurring in the result*). The order appealed from should be affirmed, but I cannot concur in the majority opinion.

The complaint alleges that on the 21st day of February, 1910, the city of *Milwaukee* filed its petition with the railroad commission of Wisconsin in accordance with ch. 540, Laws 1909, in which petition it prayed that an order be entered by the commission requiring the separation of the grade of the railway tracks from the grade of the public thoroughfares on several streets, among others West Water street; that on the 20th day of May, 1912, the railroad com-

mission made an order for the separation of the grade of said streets from the grade of the railroad and for the apportionment and cost of work of said separation.

The complaint further alleges that the order provided:

"The Milwaukee Electric Railway & Light Company shall, at its own expense, make all necessary changes to its tracks, poles, overhead equipment and conduits, and do all necessary grading and paving on that part of the streets occupied by its tracks, to wit: all that part of the roadway included between the outside rails of its tracks and a strip one foot wide on each side thereof."

"The *Chicago, Milwaukee & St. Paul Railway Company* and the Chicago & Northwestern Railway Company shall, at their own expense, do all that part of the work lying within the limits of their respective rights of way and also all that part of the work lying within those portions of the public thoroughfares that are included between the portals of the subways, or, in places where no subway is provided, between the boundary lines of the elevation work extended across said thoroughfares, except such work as is herein laid upon the Milwaukee Electric Railway & Light Company, or other companies."

"The city of *Milwaukee* shall, at its own expense, do all that part of the work which has not been laid upon the steam railway companies, the Milwaukee Electric Railway & Light Company, or other companies as herein provided, and shall assume responsibility for any alleged damages to adjacent property or business caused by the issuance or enforcement of this order or by the prosecution of the work herein ordered."

And further provided:

"Upon and along the tracks of the *Chicago, Milwaukee & St. Paul Railway Company,* the roadbed and tracks shall be elevated from a point at or near the north line of Maple street to a point at or near the north line of Fowler street." Also: "At West Water street and Fowler street grade crossings shall be provided for street traffic, and the elevation of the tracks of the *Chicago, Milwaukee & St. Paul Railway Company* above established street grade shall not be more than two and one-half feet at West Water street."

The complaint further alleges that the plaintiff owned real estate abutting on West Water street, and that the execution of the work under the order of the commission resulted in a taking of plaintiff's property and damage thereto.

This suit was brought to recover the alleged damages which the plaintiff claims to have sustained.

The appeal in this case raises the question whether the complaint is defective in failing to allege that West Water street had ever been brought to the established grade, or that the grade of West Water street had ever been duly established.

"It is a well settled rule that where a change of grade is made by authority of law and with due care, the municipality making the change is not liable for consequential injury to abutting lots, unless expressly made so by statute or the constitution. . . ." *Henry v. La Crosse,* 165 Wis. 625, 162 N. W. 174; *Walish v. Milwaukee,* 95 Wis. 16, 69 N. W. 818; *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039; *Dahlman v. Milwaukee,* 131 Wis. 427, 110 N. W. 479, 111 N. W. 675; *Drummond v. Eau Claire,* 85 Wis. 556, 55 N. W. 1028; *Harrison v. Milwaukee Co.* 51 Wis. 645, 8 N. W. 731; *Liermann v. Milwaukee,* 132 Wis. 628, 113 N. W. 65.

In *Colclough v. Milwaukee, supra,* at page 185, the court said:

"It was held in *Harrison v. Milwaukee Co.* 51 Wis. 647, 662, 8 N. W. 731, to be the settled law in this state that in the absence of any law giving the owners of real estate adjoining a public street or highway a right to recover damages of the city, village, town, or county in which the same is situated, on account of the change of the grade of such street or highway, no damages can be recovered on account of such change, unless the premises of the adjoining or abutting owner have been injured through the negligence of the municipality or its agents in making such change, and that such change of grade is not, in any case, the taking of private property for public use. The ground of complaint in that case was that the filling and trestle work being built

would render the highway inaccessible from the plaintiff's lands, and an injunction to prevent the execution of the work was refused. Similar questions have been frequently before this court, and the law has uniformly been held as stated."

This doctrine has been generally sustained in this country from the time of the decision of the supreme court of the United States in *Goszler v. Georgetown,* 6 Wheat. 593.

Sec. 8, ch. VII, of the charter of the city of *Milwaukee* provides:

"In all cases in which the grade of any street has been permanently established by ordinance since February 20, 1852, or shall hereafter be so established, and, after such permanent establishment thereof, and after such street shall have been actually graded to such established grade, the grade so established has been or shall be altered by the city, the owner of any lot or parcel of land which may be affected or injured in consequence of such alteration of grade, shall be entitled to compensation therefor, . . ."

This provision seems to require that the grade not only be established, but that the street be graded to the established grade, before any right of action for damages on account of change of grade exists.

The instant case was a proceeding for the separation of grade of the plaintiff's railroad tracks from the grade of certain streets in the city of *Milwaukee* and the apportionment of the expense between the railway company, the electric company, and the city of *Milwaukee.*

The power of the city to proceed and carry on through the railroad commission separation of grades is a valid exercise of municipal authority.

The plaintiff owns abutting property on West Water street. The complaint does not allege that the grade of West Water street was ever established, or that West Water street had ever been brought to an established grade. In the instant case the separation of grades was not a change

of grade of the street for railroad purposes, but for municipal purposes. The grade of the street never having been established, the city had a right to change it in a proceeding through the railroad commission for street purposes, and such change of grade does not constitute a taking which would entitle abutting owners to damages. This doctrine is well settled. *Henry v. La Crosse,* 165 Wis. 625, 162 N. W. 174, and cases heretofore cited.

Buchner v. C., M. & N. W. R. Co. 56 Wis. 403, 14 N. W. 273 (*S. C.* 60 Wis. 264, 19 N. W. 56); *Pabst B. Co. v. Milwaukee,* 157 Wis. 158, 147 N. W. 46, and *Eisler v. C., M. & St. P. R. Co.* 163 Wis. 86, 157 N. W. 534, are relied upon in the majority opinion. They are not in point.

In the *Buchner Case* the taking and damages flowed from an original taking for railway purposes. The railway company entered upon the highway in the original construction of its road, cut down the highway on its own initiative, dug up and carried away the soil of the abutting owner, and under the statute, of course, there was a taking of the land of the abutting owner. The case is based upon the ground that the railway company in the original construction of its road took and damaged the property of the abutting owner.

The *Pabst B. Co.* and *Eisler Cases* are distinguishable from the case at bar in two particulars: (1) there had been an established grade, and (2) the change in grade was made for railway purposes. The opinions in these two cases are based upon these propositions. It is clear that, where a grade had been established, any change made either by the municipality or the railway company, or both, entitled the abutting owner to damages as for an original taking. But it is equally clear under all authority that where the grade has not been established the municipality may change the grade without liability to the abutting owner for such change.

In the instant case, upon the undisputed facts, the change

of grade was instituted, carried on, and consummated by the municipality without the intervention of the railway company. The railway company did not take part in instituting the proceeding and never became a party to it except in so far as it was ordered to contribute to the expense of making the change by doing a part of the work. The whole proceeding was a municipal affair and carried to completion by the municipality.

Before the present proceeding was started for the change of grade the railway company was in the street, its road constructed, completed, and all damages paid for the taking and construction of its road in the street. It sought no change in grade. The fact that the change in grade made by the city may benefit the railway company does not make the change for railway purposes. It is elementary that one cannot be compelled to pay for a benefit bestowed without his consent and in the absence of law authorizing it.

Upon the undisputed facts in this case there is no law authorizing the assessment of damages sustained (if any) to abutting owners against the railway company. This is recognized in the order of the railroad commission, which provides that the city of *Milwaukee* "shall assume responsibility for any alleged damages to adjacent property or business caused by the issuance or enforcement of this order or by the proper prosecution of the work herein ordered." If any damages be recoverable by abutting owners, the same are a claim against the municipality because the proceeding was exclusively a municipal proceeding. To hold that abutting owners can recover damages against the railway company as for a taking upon a proceeding by the municipality to improve the streets for public travel in a case where the municipality had a right to change the grade without liability because the railway company merely performed its duty in complying with an order of the railroad commission, is absurd.

Of course if it be admitted that the change of grade was for railway purposes and the grade of the streets had been established, then the case would be within the *Pabst B. Co.* and *Eisler Cases.*

But, as before observed, upon the record here the grade had not been established and the change was not made for railway purposes, but for municipal purposes. On the grounds hereinbefore stated, in my opinion the order should be affirmed.

OWEN, J. (*concurring in the result*). Conceding, as is assumed in the opinion of the court, the validity of the order of the railroad commission making it the duty of the city of *Milwaukee* to bring about a change in the grade of the street to enable the separation of the crossing, I cannot agree that the taking was for railroad purposes. It is my conception that there can be no taking for railroad purposes except for the actual construction, operation, and maintenance of a railroad or to enable the railroad company to discharge some legal duty imposed upon it. At least no decided case in this state indicates that there can be a taking for railroad purposes under any other circumstances. That a taking of property to enable the construction, operation, or maintenance of a railroad is a taking for railroad purposes, will be conceded at once. In order to hold that a taking which is not essential or convenient for the construction, operation, or maintenance of the road constitutes a taking for railroad purposes it is necessary, it seems to me, that the taking be in the performance by the railroad company of some legal duty imposed upon it.

There are a number of decisions in this state, some of which are cited in the opinion of the court, holding a taking to be for railroad purposes although, obviously, the taking was not for the purpose of enabling the construction, operation, or maintenance of the railroad. In all such cases,

however, it was found that the taking was for the purpose of enabling the railroad company to discharge a duty imposed upon it by law. Perhaps a brief reference to those cases will serve to illustrate the principle I have in mind. First in order is the case of *Buchner v. C., M. & N. W. R. Co.,* which was twice before this court and will be found reported, first in 56 Wis. 403, 14 N. W. 273, and, second, 60 Wis. 264, 19 N. W. 56. In that case the railroad company in the original construction of its road crossed a highway. Under the provisions of sec. 1836, if indeed not by the common law, it was the duty of the railroad company to restore the highway to its original state of usefulness. Where the railroad crossed the highway the track was depressed a number of feet below the surface. In order to restore the highway to its original state of usefulness it was necessary to cut down the grade of the highway in front of Buchner's property. He claimed damages for the taking of his land from the highway. The question involved was whether the taking was for a railroad or a highway purpose. If for a railroad purpose, then it was in the nature of an original taking for which the plaintiff had not been compensated when the property was taken for highway purposes, entitling him to damages. The opinion of the court, on both appeals, held that the taking was for a railroad purpose.

A careful reading of the opinions in that case, and especially that of Justice CASSODAY in the 60th Wisconsin, can leave little doubt that the taking was held to be for a railroad purpose because of the legal duty devolving upon the railroad company to restore the highway to its original condition.

The railroad company secured its authority to build the railroad from the state. The state granted to it the right to cross all highways, but, as a condition, required that it restore such highways to their original state of usefulness.

This was an essential part of the construction of the railroad. In order to complete the construction of the road it was necessary not only to grade the roadbed and lay the track, but to restore all highways crossed by it to their original state of usefulness. This was something that it was required to do in order to exercise the right of building the road at all, which right was conferred upon it by law. The idea that the duty imposed by law upon the railroad company to restore the highway to its original state of usefulness was the element which made the taking one for railroad purposes, permeates the opinion in the 60th Wisconsin, as a few excerpts therefrom will abundantly disclose. On page 273 of the opinion it is said:

"A railway company gets its life and authority from the statute, and only for the purposes named in the statute. Such a company has no vicarious power to act for and in behalf of the supervisors in changing the grade of a street, under the highway laws of the state. Whatever right it may have in that regard is imposed upon it as a condition of constructing its railroad. Its right to take private property for its use is only by virtue of its chartered rights, and then only for the purposes therein designated."

And on page 276:

"No one would, we apprehend, claim that the clause of the statute requiring condemnation and compensation does not apply when the railroad is constructed 'along or upon a highway,' nor to so much of the street occupied by the railroad in crossing a highway. So it seems to us that it applies to that portion of the highway which the railway company, as a condition of constructing its railroad across, along, or upon a highway, is required to restore to its former condition of usefulness, and thereafter to maintain in that condition."

And on page 277:

"The liability of the company is not limited to its absolute physical necessities, but is measured by its imperative *legal* necessities."

We will end our consideration of the *Buchner Case* by simply saying that the taking of property in a highway in order to conform the grade of the highway with that of the roadbed of the railroad company which crosses the highway is not, obviously, a taking to enable the company to construct, operate, or maintain its railroad. It is a taking made necessary to restore and maintain the highway as a course of travel. Because the duty of so restoring the highway to its original condition was imposed upon the railroad company, such restoration became a railroad undertaking, a part of the construction of the road as much as the grading of the roadbed or the laying of its rails, and property taken therefor was taken for a railroad purpose.

The subsequent cases of *Shealy v. C., M. & N. R. Co.* 72 Wis. 471, 40 N. W. 145, and *S. C.* 77 Wis. 653, 46 N. W. 887, but follow the rule of the *Buchner Case.* The cases of *Pabst B. Co. v. Milwaukee,* 157 Wis. 158, 147 N. W. 46, and *Eisler v. C., M. & St. P. R. Co.* 163 Wis. 86, 157 N. W. 534, are relied on in the opinion of the court in support of the proposition, which dominates the opinion, that the "taking for grade-separation purposes is always a railroad taking." If those cases establish that proposition, then it must be conceded that the opinion of the court is well grounded. However, I do not so understand them. The consideration which induced the court to hold in those cases that the takings there in question were takings for railroad purposes was the same consideration which prompted the decision in the *Buchner Case,* and that is that the law imposed upon the railroad company the burden of bringing about a separation of the crossings there involved. In those cases the separation was brought about pursuant to ordinances of the common council of the city of *Milwaukee* compelling the railroad companies to separate the crossings. These ordinances were enacted pursuant to a provision of the charter of the city of *Milwaukee* (Laws 1874, ch. 184,

subch. IV, sec. 3, sub. 48) conferring upon the city council power "to require railroad companies to construct and maintain at their own expense such bridges, viaducts, tunnels, or other conveniences, at public railroad crossings, as the common council may deem necessary." It was held in *Superior v. Roemer,* 154 Wis. 345, 141 N. W. 250, that similar language in the charter of the city of Superior not only laid the entire burden of bringing about the separation of grade crossings upon the railroad company, but also inhibited the city from contributing anything to the expense thereof, and the same ruling is made with reference to this provision in the charter of the city of *Milwaukee* in *Application of Kaiser,* 171 Wis. 40, 174 N. W. 714, 176 N. W. 781.

I think the decisions in the *Pabst B. Co.* and *Eisler Cases* were entirely right, but I do not think they are controlling here. As we have seen, the law applicable to the situation considered in those cases laid upon the railroad company the duty of accomplishing the grade separations. The law made it a railroad undertaking, the same as was that dealt with in the *Buchner Case,* and any property taken in the performance of such duty was necessarily taken for railroad purposes.

In this case the order of the railroad commission imposes upon the city the burden of bringing about the change of grade in the street in order to accomplish the separation of the crossings. Assuming, as is assumed in the opinion of the court, that the statute authorizes the railroad commission to make this order, then it imposes upon the municipality the duty of accomplishing the change of grade in the street as much as though it were directly imposed by the statute. As said in the opinion in *Application of Kaiser, supra,* the legislature has plenary power to bring about an elimination of dangerous grade crossings, and that in making provision therefor it may impose the entire expense upon the railroad company, or upon the municipality, or

apportion it between the two. The law under which the railroad commission acted authorizes the commission to order a separation of dangerous grade crossings and to apportion the expense between the railroad company and the municipality. It is perhaps more accurate to say that the order here apportioned responsibility or duty rather than expense, and the duty imposed upon the municipality was to bring about a change in the grade of its street so as to consummate a safe crossing over the railroad tracks. Municipalities have inherent power to change the grades of their streets, and the order of the railroad commission laid upon the city of *Milwaukee* no duty which it did not have the power to perform. The change of grade in a street being a well-recognized and oft-exercised power of a municipality, I can see no reason for saying that, when that power is exercised to bring about a safe crossing over railroad tracks, the taking of property necessary therefor becomes a taking for railroad purposes, in the absence of any law imposing any duty in that respect upon railroad companies. Can it be said that if the legislature of this state, in its wisdom, laid the entire burden of bringing about the separation of grade crossings upon the municipalities, the change of grade by a municipality for the purpose of accomplishing such separation constitutes a taking of property for railroad purposes? Such a contention, manifestly, would be absurd. Is it more logical to say that, where the legislature provides for an apportionment of burden and responsibility in bringing about the separation of grade crossings, the change of grade in the street by a municipality, where that burden and responsibility is placed upon the municipality, creates a taking for railroad purposes? Such logic necessarily leads to the conclusion that while the order made by the railroad commission in this case is a lawful order, nevertheless it has imposed upon the city of *Milwaukee* a burden which it has no power to carry out, because it cannot condemn property for railroad purposes. I think, therefore, there is neither logic

nor authority for the proposition that the taking of property for grade-separation purposes is always a railroad taking, and in my opinion it cannot be held to be a railroad taking unless the taking is by the railroad company itself to enable it to comply with a legal duty imposed upon it.

If the idea which dominates the majority opinion is correct, then I should like to inquire why it is that in *Application of Doss,* 171 Wis. 52, 174 N. W. 718, a companion case to *Application of Kaiser, supra,* both of which are decided herewith, it was held that no liability existed upon the railroad company for the taking of property on the south side of Oklahoma avenue to bring about a separation of grade crossings, while in the *Kaiser Case* it was held that it was liable for property taken on the north side of Oklahoma avenue? If a railroad company is liable under all circumstances, without any reference to its legal responsibilities or duties, for property taken to bring about a change of grade in a street to consummate a separation of grade crossings, then why was not the railroad company liable for property taken situated in the town of Lake as well as for property taken situated in the city of *Milwaukee?* The diametrically opposite conclusions reached in those two cases were due entirely to the fact that the law then existing imposed the entire burden of bringing about a separation of crossings in the city of *Milwaukee* upon the railroad company, while no such law could be found imposing similar responsibilities upon the railroad company for bringing about a separation of grades in towns. But if the dominating idea of the majority opinion in this case "that the taking for grade-separation purposes is always a railroad taking" is correct, then the railroad company should have been held liable for the taking on the town of Lake side of Oklahoma avenue as well as on the city of *Milwaukee* side. The decision in this case is utterly inconsistent, it seems to me, with the deci-

sions in those two cases. If the decision here is correct, then the decision in *Application of Doss* is wrong; and if the railroad company should be held liable for compensation in *Application of Doss,* it would have to be held so liable in the absence of any statutory authority imposing liability upon it, and I feel quite safe in making the assertion that no such liability existed at common law.

It is my conclusion, therefore, that whether or not a taking for grade-separation purposes constitutes a railroad taking depends upon whether the law imposes upon the railroad company a legal duty to bring about the separation of crossings so that the taking is in the discharge of a railroad duty; and that where the law imposes upon the municipality the duty of bringing the street to an appropriate grade the undertaking is a municipal purpose and the taking necessary therefor is a municipal and not a railroad taking. In the *Pabst B. Co.* and *Eisler Cases* the law imposed upon the railroad company the entire burden of bringing about a separation of grade crossings, and any property taken in the accomplishment of such separations was taken for railroad purposes. The same is true in *Application of Kaiser.* But for the reason that no such duty was imposed upon the railroad company in *Application of Doss,* the taking was held not to be for a railroad purpose and no liability devolved upon the railroad company. It follows that, in my opinion, the taking here was a taking for a municipal purpose, and that, because a grade had never been established in the street in question, abutting property owners are entitled to no damages for the taking. *Harrison v. Milwaukee Co.* 51 Wis. 645, 8 N. W. 731; *Drummond v. Eau Claire,* 85 Wis. 556, 55 N. W. 1028; *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039; *Walish v. Milwaukee,* 95 Wis. 16, 69 N. W. 818; *Dahlman v. Milwaukee,* 131 Wis. 427, 439, 110 N. W. 479, 111 N. W. 675; *Liermann v. Milwaukee,* 132 Wis.

628, 113 N. W. 65; *Henry v. La Crosse,* 165 Wis. 625, 162 N. W. 174.

As stated in the majority opinion, much reliance has been placed upon the *Henry Case, supra.* To my mind, that case is very much like the *Pabst B. Co. Case,* but treated in the opinion of this court from a different viewpoint. In that case as well as in the *Pabst B. Co. Case* an abutting property owner brought suit against the city for damages resulting from a change of grade in the street. In the *Pabst B. Co. Case* it was decided that he was not entitled to damages because the taking was not a taking for railroad purposes. In the *Henry Case* the plaintiff was denied recovery because it was held that there had been no change in an established grade, a fact which it was necessary for him to prove in order to recover against the city. The action in the *Henry Case* being one against the city, and it being established that there was no change of grade, it followed that the city was not liable, and that ended the case. The question decided in the *Pabst B. Co. Case* was never reached or discussed in the *Henry Case.*

In my opinion the order in this case should be affirmed, but not upon the grounds stated in the majority opinion.

ESCHWEILER, J. (*concurring in the result*). I agree that the order below should be affirmed, but not upon the grounds stated in the majority opinion. I agree with what has been said by Justices KERWIN and OWEN in their opinions filed herewith.

SCHOLL, Administratrix, Respondent, vs. MUSCOVITZ, Appellant.

October 7—November 4, 1919.

Deeds: Forfeiture: Trivial breach of condition.

Where a son received conveyance of a farm from his father on condition that he should support the father, make payments aggregating $1,500 to certain named persons, make a stated yearly payment to the father, and cultivate and harvest two acres for him, and the son performed the contract to support for more than thirteen years, paid $1,150 of the $1,500 to the persons designated, and stood ready to pay the balance whenever a legal representative was appointed for a beneficiary who had died, a court of equity should not have declared forfeiture of title after a single failure to cultivate the two acres, but should have directed a money settlement for the breach.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Reversed.*

This was an equitable action originally brought by an aged father against his son to cancel a deed of a farm (made in consideration of a contract to support the father and make certain payments to three persons named in the contract) on the ground of failure to fully perform the conditions of the contract. The action was commenced in November, 1917, and tried in May, 1918. Since the entry of the judgment in the trial court the original plaintiff has died and the administratrix of his estate has been substituted as the party plaintiff.

The facts were not seriously in dispute. The deceased deeded his home farm of 200 acres of land to the defendant March 14, 1903, the deed containing the following agreements on the part of the defendant, viz.: to pay to Mary Stillwell, Lizzie Scholl, and *Emma Scholl* the sum of $500 each and to the deceased $75 annually on or before December 1st each year; also to board the deceased at his table, furnish him firewood and medical attendance, and provide

for his funeral. The agreement also provided that deceased reserved certain farm buildings for his dwelling and two acres of land therein described, which the defendant agreed to plow, cultivate, and harvest in the best possible manner. The deed contained a further provision that if the conditions were not fulfilled it was to be null and void.

The deceased lived with the defendant from March, 1903, up to October, 1917, and during this entire time the defendant performed the conditions of the contract for support reasonably well. He also made all the annual payments of $75, including the payment due December 1, 1918, and made the payments of $500 each to two of the beneficiaries, but the third beneficiary, Mary Stillwell, died some ten years since, having been paid only $150, and the remaining $350 has not been paid, apparently owing to the fact that there has been no personal representative of her estate ever appointed who had the right to demand payment of the balance, although the defendant has offered to pay it to the children of Mary Stillwell. In October, 1917, the defendant had serious difficulty with his wife and was arrested for striking her. A divorce action resulted and the wife left the home. It was then arranged that the deceased should board with his daughter, Mrs. Scholl, at defendant's expense, and the deceased went there to board and declared himself satisfied with the arrangement. A difficulty arose about the plowing of the two acres in the spring of 1916 or 1917, and the deceased finally rented the same to third parties, although the defendant offered to plow it. The deceased was boarding with the daughter under this arrangement at the time this action was brought in November, 1917, and at the time of the trial in May, 1918. The court found that the defendant had neglected to perform the conditions of the deed by failing to pay the Stillwell money, by failing to furnish the deceased with board and care and attention, and by failing to cultivate the two acres, and adjudged that the defendant

had forfeited all title to the farm and revested the title thereof in the deceased. From this judgment the defendant appeals.

F. E. Withrow of La Crosse, for the appellant.

For the respondent there was a brief by *Smith & Moen* of Viroqua, and oral argument by *J. A. Moen.*

WINSLOW, C. J. The judgment seems a very harsh one to be rendered by a court of equity. The defendant had faithfully performed his contract for board and support for more than thirteen years; he had made the annual cash payment of $75 up to the time of the trial, one such payment having been accepted even after this action was brought; he had arranged for the board and care of his father at his sister's at his own expense when the break-up of his own household took place, which arrangement was satisfactory to the deceased; he had paid $1,150 out of the $1,500 agreed to be paid to the three beneficiaries and stood ready to pay the balance whenever a person legally entitled to receive the same should be appointed. Apparently the deceased retained possession of the two acres and rented it to third parties notwithstanding the disagreement about the plowing. The total cash paid out by the defendant under his agreement aggregates $2,250, and the evidence seems to show that he was ready and anxious to carry out his agreements at the time of the trial.

We cannot regard the breaches as really substantial nor as justifying a court of equity in revesting the title in the deceased. Such a court will avoid the enforcement of a forfeiture if possible and has other remedies which it may and ought to administer in case of insubstantial breaches of conditions like the present, where such conditions have been faithfully performed for many years, where the defaults are not wilful, and the condition of forfeiture was evidently inserted as security for the performance of acts damages

for the breach of which may fairly be estimated in money. *Maginnis v. Knickerbocker Ice Co.* 112 Wis. 385, 88 N. W. 300; *Danielson v. Danielson,* 165 Wis. 171, 161 N. W. 787.

In the present case there were really no substantial breaches which could not be measured in money. The deceased, upon the break-up of the defendant's family, had accepted as satisfactory board and care at his daughter's, to be paid for by the defendant; and there is nothing to show that this board and care was not in substantial accordance with the contract. There cannot be said to be any breach here, because the deceased accepted the substitution as entirely satisfactory and also accepted the annual cash payment of $75 several months after he commenced to board with his daughter. So far as the plowing and cultivation of the two acres is concerned, damages for the breach of this agreement could be readily measured in money, and there was in fact no other breach, for the failure to pay the entire $500 to Mary Stillwell cannot be called a breach under the circumstances shown.

Clearly the court should have provided for the deposit of the money due to the Stillwell estate in court within a reasonable time and the giving of security for the board and care of the deceased and the payment of the annual amount due him as well as the plowing and cultivation of the two acres, or these charges could have been made liens on the land to be foreclosed in case of noncompliance with their terms, and thus the evident injustice of taking the farm away from the defendant after he had paid so much for it would have been avoided. The death of the father so soon after the supposed breach makes the injustice of a forfeiture of title more apparent and the framing of the proper judgment easier. The court should require the Stillwell money to be paid into court within a reasonable time to be fixed and should ascertain the amount due the estate of the deceased for plowing and cultivation of the two acres and for board

and care (if such board and care has not already been paid for by the defendant), and also require these sums to be paid into court within such time as fixed, and upon the performance of these conditions render judgment confirming the title in the defendant, and in case of nonperformance divest the defendant's title and vest it in the heirs of the deceased.

By the Court.—Judgment reversed, and action remanded for further proceedings and judgment in accordance with the opinion.

AMERICAN AMUSEMENT COMPANY, Appellant, vs. MCWILLIAMS, Respondent.

October 7—November 4, 1919.

Master and servant: Compensation: Share in profits.

In an action against the manager of a theater for an accounting, the evidence is *held* to show that his compensation was to be a percentage of the profits and does not sustain a finding by a referee, confirmed by the court, that he was entitled to the value of the services rendered.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

This is an action brought by the plaintiff for an accounting by the defendant, an employee of plaintiff as manager of the Casino theater in the city of La Crosse. The defendant set up a counterclaim for compensation for services as manager of the Strand theater of La Crosse, which the plaintiff also owned and operated.

The written contract of employment of defendant by plaintiff as manager of the Casino theater was dated August 1, 1914, and provided that the defendant should receive a salary of $25 a week and twenty-five per cent. of the net profits. It also provided that the defendant was not en-

titled to receive the stipulated salary in any month unless the receipts were sufficient to first pay the operating expenses.

The contract by its terms expired August 1, 1915, but defendant continued to operate the Casino theater under the terms of the contract until February, 1917. The Strand theater, also owned by plaintiff, was opened in La Crosse about Thanksgiving Day, 1915, and defendant was engaged to manage it in connection with his management of the Casino theater. He continued such management until February, 1917.

No written agreement was entered into fixing the compensation for defendant's services as manager of the Strand. Defendant claims that he and Mr. Parkinson, president of plaintiff company, had conversations in regard to the matter in which it was suggested that defendant receive a share of the profits which should be a greater percentage than that received under the management of the Casino theater; that the theater be run for thirty, sixty, or ninety days to find out what the business would be, and then an arrangement should be made as to compensation. Mr. Parkinson, president of plaintiff company, testified in effect that defendant was not to receive a salary from the Strand and that no arrangement was made by which defendant was to share in any profits from the Strand.

The Strand theater was an unprofitable business venture and did not pay expenses from the beginning. Defendant managed the two theaters together, paid out all money and drew all checks, and kept separate books and bank accounts. In February, 1917, defendant resigned as an employee of the plaintiff company. Thereafter plaintiff brought this action to compel defendant to make an accounting under his employment.

The issues were tried before a referee, who made findings to the effect that there was a balance of $700.90 in defend-

ant's hands of the amount he received as such theater manager over the expenses paid by him, including his compensation as manager of the Casino theater, and that defendant was entitled to receive as compensation for managing the Strand theater $945. He ordered judgment for the defendant for $244.10. The parties then discovered certain errors in the computations made by the referee and stipulated that the fourth finding of the referee be amended by inserting the sum of $945 instead of $700.90. It was further stipulated that in case the referee's fifth finding, to the effect that the defendant was entitled to compensation as manager of the Strand theater in the sum of $945, should be sustained by the circuit court upon review of the referee's findings, plaintiff would not be entitled to recover and that judgment be entered that neither party recover from the other; and that in case the fifth finding should not be sustained judgment be entered in favor of the plaintiff for $945 and costs.

The circuit court sustained the referee's fifth finding of fact, and judgment was entered dismissing plaintiff's complaint in accordance with the terms of the stipulation. This is an appeal from such judgment.

For the appellant there was a brief by *McConnell & Schweizer* of La Crosse, and oral argument by *C. H. Schweizer.*

John F. Doherty of La Crosse, for the respondent.

SIEBECKER, J. The controversy on this appeal presents the inquiry whether or not the referee is correct in his finding of fact and conclusion of law to the effect that it was understood between Parkinson, president of the *American Amusement Company,* and the defendant, at the time defendant commenced operating the Strand theater in November, 1915, that defendant was to be compensated for his

services in conducting this theater, and in default of fixing the amount thereof defendant is entitled to recover a reasonable amount for services rendered?

This finding of fact and conclusion of law was confirmed by the circuit court upon the ground that this fact so found cannot be held to be against the clear preponderance of evidence in the case. The evidence bearing on this point is confined to the statements of interviews between Mr. Parkinson and the defendant, which must be interpreted in the light of the circumstances under which they were had. The defendant had operated the Casino theater under contract for one year ending August 1, 1915. Before the expiration of the contract, interviews between Parkinson and defendant concerning the erection of another theater were had in which Parkinson asked: "If I build this theater will you stand by me?" and defendant stated he would. The question of compensation was not then alluded to. The defendant continued operating the Casino theater under the former agreement, which provided for a salary of $25 per week and twenty-five per cent. of its net profits, which salary was not to be paid unless the receipts of the business above operating expenses were sufficient to pay them. Shortly before opening the Strand in November, 1915, the parties alluded to defendant's compensation for operating it. Parkinson testifies that defendant suggested receiving one third of the profits without any salary. The defendant's version of the interview is that when he was asked about compensation for operating the Strand he stated: "I don't want to be hogging all the profits, I want to see how you come out here with your investment. Possibly we can handle it on some percentage terms; might deduct the costs and expenses and divide the profits, two thirds to you, one third to me, as a basis. Give it a test for either sixty or ninety days and see what the theater is going to do and see what happens." Defendant denies that it was then under-

stood he was to be compensated out of profits from operating the Strand, and that no arrangements were thereafter made fixing his compensation. He had exclusive management of the Strand for a period of sixty-three weeks ending February 4, 1917. The enterprise was unprofitable and defendant did not make a charge in his accounts for services for conducting the Strand until they terminated, and then he held the profits from the Casino as payment for his services in operating the Strand. Considering the declaration of defendant in the light of his employment by plaintiff for operating the Casino, and all the facts and circumstances under which the interviews between the parties were had, it warrants but the one conclusion that it was understood by them that defendant was to be compensated for his services in operating the Strand out of the profits, if any were realized. The fact that the parties agreed to operate the Strand for some months before fixing the definite amount to be paid defendant does not contradict the idea then entertained by them that they contemplated and understood that defendant was to be paid out of the profits. This being the case, it follows that defendant was bound by the arrangement as far as consummated, and since the venture produced no profits he cannot claim payment for his services. We are persuaded that the referee's fifth finding is not sustained by the evidence; that the court erred in confirming it; and the judgment appealed from must be reversed. The plaintiff is entitled to judgment for the recovery of the $945 with interest at six per cent. from the commencement of the action, pursuant to the stipulation of the parties dated June 3, 1919.

By the Court.—It is so ordered.

OLSON and wife, Respondents, vs. LAUN and wife, Appellants.

October 7—November 4, 1919.

Fraud: Evidence: Disparity between price and value: Grossly excessive price: Reliance and right to rely on representations: Trial: Requested instructions covered by charge: Interest on unliquidated claim.

1. In an action for fraud in the sale of a farm, disparity between the price paid and the actual value is a fact to be considered by the jury in determining whether the plaintiff buyer relied on the defendant seller's representations and whether he should have discovered their falsity.
2. Where the amount paid by the plaintiff for a farm which he purchased from the defendant was grossly excessive, that fact in itself was evidence of fraud by defendant.
3. The evidence in the case—showing that the defendant had orally and by written advertisement represented that there were 160 acres of plow land on the farm, that he misstated its tax assessment, and that the plaintiff, in the hurried examination he gave the farm, was not able to determine the acreage under plow—supports the finding of the jury that the plaintiff had a right to rely on defendant's representations in regard to the number of acres of cultivated land.
4. Under all the circumstances, findings of the jury that plaintiff was warranted in relying on the representations of defendant as to the amount of white oak timber on the farm and the amount of hay and pasture land and the farm's productiveness are *held* to be supported by the evidence.
5. Where the charge of the court was plain and fair and covered all the material issues in the case, there was no error in refusing to give certain requested instructions.
6. The amount of the claim of a buyer of a farm against the seller thereof for damages for misrepresentations not having been liquidated before verdict, the trial court properly allowed interest only from the date of the verdict and denied interest from the time the deal was consummated.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This action was brought to recover for fraud in the sale of a farm. The complaint set up that false representations

were made by defendants, relied upon by plaintiffs, which resulted in damages. The case was submitted to the jury and the following verdict returned:

"(1) Did the defendant *E. G. Laun,* for the purpose of inducing the plaintiff to purchase the farm in question, represent to the plaintiff that there were 160 acres of cultivated land upon said farm? *A.* Yes.

"(2) If you answer question number 1 'Yes,' then was such representation false? *A.* Yes.

"(3) If you answer number 1 'Yes,' then did the plaintiff believe such representation to be true and rely thereon in making the purchase of said farm? *A.* Yes.

"(4) If you answer question number 1 'Yes,' then ought the plaintiff, in view of his intelligence and experience, in the exercise of ordinary care have discovered the falsity of such representation before purchasing the farm? *A.* No.

"(5) Did the defendant *E. G. Laun,* for the purpose of inducing the plaintiff to purchase said farm in question, represent to the plaintiff that there was about a million feet of large white oak timber thereon? *A.* Yes.

"(6) If you answer question number 5 'Yes,' then was such representation false? *A.* Yes.

"(7) If you answer question number 5 'Yes,' then did the plaintiff believe such representation to be true and rely thereon in making the purchase of said farm? *A.* Yes.

"(8) If you answer question number 5 'Yes,' then ought the plaintiff, in view of his intelligence and experience, in the exercise of ordinary care have discovered the falsity of such representation before purchasing the farm? *A.* No.

"(9) Did the defendant *E. G. Laun,* for the purpose of inducing the plaintiff to purchase the farm in question, represent to the plaintiff that there were ten or twelve acres of hay land upon the uncultivated portion of said farm? *A.* Yes.

"(10) If you answer question number 9 'Yes,' then was such representation false? *A.* Yes.

"(11) If you answer question number 9 'Yes,' then did the plaintiff believe such representation to be true and rely thereon in making the purchase of said farm? *A.* Yes.

"(12) If you answer question number 9 'Yes,' then ought the plaintiff, in view of his intelligence and experience, in

the exercise of ordinary care have discovered the falsity of such representation before purchasing the farm? *A.* No.

"(13) Did the defendant *E. G. Laun,* for the purpose of inducing the plaintiff to purchase the farm in question, represent to the plaintiff that there was sufficient pasture upon the uncultivated portion of said farm for 100 head of cattle? *A.* Yes.

"(14) If you answer question number 13 'Yes,' then was such representation false? *A.* Yes.

"(15) If you answer question number 13 'Yes,' then did the plaintiff believe such representation to be true and rely thereon in making the purchase of said farm? *A.* Yes.

"(16) If you answer question number 13 'Yes,' then ought the plaintiff, in view of his intelligence and experience, in the exercise of ordinary care have discovered the falsity of such representation before purchasing the farm? *A.* No.

"(17) Did the defendant *E. G. Laun,* for the purpose of inducing the plaintiff to purchase the farm in question, represent to the plaintiff that the tenant for the previous year had sold $1,800 worth of corn from said farm? *A.* Yes.

"(18) If you answer question number 17 'Yes,' then was such representation false? *A.* Yes.

"(19) If you answer question number 17 'Yes,' then did the plaintiff believe such representation to be true and rely thereon in making the purchase of said farm? *A.* Yes.

"(20) If you answer question number 17 'Yes,' then ought the plaintiff, in view of his intelligence and experience, in the exercise of ordinary care have discovered the falsity of such representation before purchasing the farm? *A.* No.

"(21) What was the fair market value of the farm in question on April 11, 1918? *A.* Five thousand five hundred dollars ($5,500).

"(22) If you answer either or all of questions 1, 5, 9, 13, and 17 'Yes,' and that such representations were false, then what would have been the fair market value of said farm on April 11, 1918, had such representations been true? *A.* Twelve thousand dollars ($12,000).

"(23) What was the fair market value of the farm in Monroe county which the plaintiff conveyed to the defend-

ants on the 11th of April, 1918? *A.* Six thousand dollars ($6,000)."

Judgment was entered upon the verdict and the defendants appealed.

For the appellants there were briefs by *Mahoney & Schubert,* attorneys, and *Jesse E. Higbee,* of counsel, and oral argument by *Mr. Paul W. Mahoney* and *Mr. Higbee,* all of La Crosse.

For the respondents there was a brief by *Baldwin & Bosshard* of La Crosse, and oral argument by *Mr. C. L. Baldwin.*

KERWIN, J. The findings of the jury in this case sufficiently show the issuable material facts. The main question involved is whether the verdict is supported by the evidence. In addition to the facts found by the jury it is established by the evidence that defendant represented that the tax assessment against the farm sold the plaintiff was $180, when in fact it was only $50.

It is not seriously denied that the representations found were made and were false. It is insisted, however, that plaintiff *Ole Olson* and his brother-in-law examined the land and that the plaintiff relied upon his own judgment and regarded the representations of defendant as opinion merely. While there is evidence tending to show that plaintiff regarded some of the representations matter of opinion, he says that he understood such representations to be the honest judgment of defendant. It is clear from the evidence that the jury were warranted in finding that the material representations were made and were false to the knowledge of the defendant.

It appears quite clearly from the evidence that the parties were not on equal terms, and plaintiff not in a position to judge of the truth of the representations made, and that the conduct of defendant shows an effort on his part to deceive

plaintiff. It was established that the farm was not in fact worth more than $5,500, and the disparity between the price paid and the actual value was a fact to be considered by the jury in determining whether the plaintiff relied on the representations and whether he should have discovered the falsity thereof, in view of all the evidence.

The amount paid by plaintiff for the farm was so grossly excessive as in itself to be evidence of fraud. *Kuelkamp v. Hidding,* 31 Wis. 503; *Risch v. Von Lillienthal,* 34 Wis. 250. The representation that $180 was the amount of taxes assessed against the farm was concededly false and obviously made to support the defendant's representations as to the value of the land. The same is true as regards the representations of quantity of timber, acreage of plow and hay land, and productiveness of low and pasture land. The evidence shows a studied scheme on the part of defendant to deceive the plaintiff and obtain from him by deception and fraud a price more than double the actual value of the farm. In the hurried examination of the farm by plaintiff there is evidence that he could not determine the acreage under plow. Defendant represented orally as well as by written advertisement that there were 160 acres of plow land. In view of all the circumstances of the case as shown by the evidence, the jury were entitled to find that the plaintiff had a right to rely on defendant's representations in this regard. *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932; *Ledbetter v. Davis,* 121 Ind. 119, 22 N. E. 744.

Regarding the representations as to white oak timber, the advertisement of the farm for sale stated that there was large white oak timber, and the jury had a right to find, under all the circumstances, that plaintiff was warranted in relying upon such representation.

The same is true as regards representations of amount of hay and pasture land and productiveness of the farm.

It is not necessary to discuss the evidence in detail; it is

sufficient to say that a careful examination of the record convinces the court that the material findings of the jury are supported by the evidence.

Counsel assigns error on refusal to give certain instructions. The charge given covers all the material issues in the case, it is plain and fair, and we find no error in refusing to give the instructions requested.

Counsel for respondents served a notice in accordance with sec. 3049*a*, Stats., asking a review under this section and modification of the judgment by adding interest from April 11, 1918, the time that the deal was consummated. The court below allowed interest from the time of the rendition of the verdict. The amount of the claim of the plaintiff had not been liquidated before verdict, and we are of opinion that the court below was right in allowing interest only from the date of the verdict. *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *J. I. Case Plow Works v. Niles & Scott Co.* 107 Wis. 9, 82 N. W. 568.

We are satisfied that the judgment is right and should be affirmed. *Eberhardt v. Randall,* 166 Wis. 480, 166 N. W. 6; *Westra v. Roberts,* 156 Wis. 230, 145 N. W. 773.

By the Court.—Judgment is affirmed.

MORGAN, Respondent, vs. RICHTER, Garnishee, Appellant.

October 8—November 4, 1919.

Vendor and purchaser: Construction of contract: "Net return" of auction sale: Ascertainment of amount due: Appeal: Presumption of correctness of judgment.

1. Where it appeared that the trial court, in directing the entry of judgment against a garnishee defendant, inserted an amount different from that stated in the findings of fact, and where it also appeared that the parties had agreed, on reargument of the case before the filing of findings, that the amount

named in the judgment was the amount due under plaintiff's theory of the case, and where no motion was made to correct the error, it will be presumed on appeal that the judgment was right and that the error was in the insertion of the amounts in the findings.

2. Under an agreement between a vendor and a purchaser, to whom the vendor had conveyed his farm and the personal property thereon, that the purchaser should sell the personal property at auction and make certain payments to the vendor "if said sale result in a net return of $2,000 over and above all expenses of sale," the "net return" was to be ascertained by deducting from the amount for which the property was sold the expenses of the sale.

3. Where the purchaser agreed to sell the personal property at public auction and make payments to the vendor depending upon the net return of the sale, he was chargeable with the amounts for which portions of the property had been sold, although payment in full had not been received by him.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Garnishment. The defendants the Rucks exchanged their farm in Portage county, with certain personal property upon it, for property in Milwaukee belonging to *Richter,* garnishee defendant. After the contract had been made and the possession of the property delivered to the garnishee defendant, the Rucks were unable to fulfil their part of it because upon some of the personal property there was a chattel mortgage. A second contract was entered into between the Rucks and the garnishee defendant, wherein it was recited that title to the farm and to all stock, grain, and machinery, and other personal property, had been duly conveyed to *A. W. Richter* on October 30, 1916; that the Rucks were caring for such property for *Richter* until he should find a suitable man; that *Richter* was to receive title to all the personal property subject only to chattel mortgages on three horses and seven cows; that *Richter* did not assume the chattel mortgages and was not to pay them; that the Rucks had agreed that said chattel mortgages could be con-

tinued; that they were unable to continue the chattel mortgages; and "it is hereby agreed that an auction sale be held by the said *Richter,* and all stock, horses, and other personal property be sold, and if said sale results in a net return of $2,000 over and above all expenses of sale, then said Peter Ruck is to receive the $500 and the $500 note as provided in their previous contract, subject to the deduction of the items therein mentioned, which said *Richter* has already paid; but if said sale results in a net return of less than $2,000, then the difference is to be deducted from the $500 and the $500 note which Peter Ruck was to receive under said contract;" and other covenants not material here.

The sale was held, and at the sale the purchasers bid $2,033.05. The expenses of the sale amounted to $165.33. The items in dispute relate to a team which was sold to one Dr. Wilson for $325, hay sold to Dr. Wilson at $88, and oats sold to Dr. Wilson for $55. It was conceded that the garnishee defendant paid out $607.45 on account of defendants, which he was entitled to do. The garnishee defendant contends that the item of $325 should be allowed at $135; that he should not be charged with the item for hay and oats for the reason that he has been unable to collect therefor; that he is also entitled to deduct $66 on account of goods sold to the plaintiff; that the gross amount of the sale is $1,631.68; and that the amount with which the garnishee defendant was chargeable is $1,496.05.

It appears without dispute that the team in question was sold to Wilson for $325; that the horses were delivered to him and Wilson acknowledged an indebtedness to *Richter* for them. The horses were afterwards replevied by *Richter,* who gave bond, took the team, and sold them in Milwaukee for $250.

The court awarded judgment in favor of the plaintiff in the sum of $291.40 with costs, from which judgment the garnishee defendant appeals.

For the appellant the cause was submitted on the brief of *A. W. Richter* of Milwaukee.

W. E. Atwell of Stevens Point, for the respondent.

ROSENBERRY, J. 1. There appears to have been an error of $31.13 in the computation of the amount due under the plaintiff's theory of the case. However, there was no motion in the trial court to correct this error. After the decision of the trial court, before the findings were filed, there was a reargument of the case, and upon this reargument it appears to have been agreed upon that the amount due under the plaintiff's theory was $291.40, but an error was made in inserting the amounts in the findings of fact, and, there being no motion to correct the error, we must presume that the judgment is right and the error was in the insertion of the amounts in the findings.

2. The main question presented is, Do the words *nēt return* as used in the second contract mean a net cash return to the garnishee defendant from the sale, or do they mean the amount for which the property sold less the expenses of sale? In this case we think it entirely unnecessary to consider the technical meaning of the terms *net profits, net return,* or *net result.* The contract itself states what is meant, particularly so when we have in mind the fact that the sale was made of property the title to which was already vested in the garnishee defendant, and the sole object and purpose was to arrive at the amount for which the garnishee defendant should be accountable to the main defendant. The contract says, "and if said sale result in a net return of $2,000 over and *above all expenses of sale,* then," etc. This does not leave the matter of what is meant by the term *net return* open to construction. The net return is to be ascertained by deducting from the amount for which the property sold the expenses of the sale, and the judgment of the court is based upon the result so obtained.

3. It appears without dispute that on the day of the sale one horse was sold to Wilson for $170, and that a second horse was sold to the garnishee defendant for $170. Subsequent to the sale some arrangement was entered into between the garnishee defendant and Wilson whereby Wilson was to take both horses for $325. The possession of the horses was delivered to Wilson under that arrangement. Subsequently the garnishee defendant replevied the horses from Wilson, shipped them to Milwaukee, and sold them, receiving $135 for them after deducting expenses. In the settlement the court charged the garnishee defendant with $325, and we think correctly so. It is a serious question whether or not he should not have been charged with $340. But there is no exception or motion to correct the judgment in that particular. We think the other items in dispute were also properly chargeable to the garnishee defendant. They were sold on the day of the sale, at the prices at which they were charged. It was the duty of the garnishee defendant to see that they were sold to responsible parties. The whole responsibility for the sale was with the garnishee defendant. No useful purpose would be served by further discussing the details of these transactions. The arrangement was entered into not as a means of disposing of the property of the Rucks, title to which had already passed to the garnishee defendant, but for the purpose apparently of establishing the liability of the Rucks to the garnishee defendant and incidentally to convert the defendants' property into money. On the basis of the contract the trial court's determination was right and must be affirmed.

By the Court.—Judgment affirmed.

GOLDBERG, Appellant, vs. SENECA, SIGEL & RUDOLPH MUTUAL FIRE INSURANCE COMPANY, Respondent.

October 8—November 4, 1919.

Insurance: Knowledge of by-laws of mutual insurance company: When liability attaches: Oral contract with agent: Liability in violation of by-laws: Appeal: Disposition of case.

1. Under secs. 1927 and 1933, Stats., providing for the organization of town mutual fire insurance companies and making every policy-holder in such a company a member thereof, an applicant for insurance who held other insurance in the company and was therefore a member was charged with knowledge of by-laws fixing the conditions of insurance.
2. Under a by-law of the company providing that it should be liable for losses occurring from the time an application for insurance was received by the secretary until its rejection, it was not liable for a loss before the application reached the secretary.
3. This by-law prevented any liability on the soliciting agent's oral contract of insurance made with the applicant, who was already a member of the company by reason of other insurance.
4. Sec. 1933, requiring the applicant, at the time of effecting insurance with a mutual company, to pay such sums as may be required by the rules or by-laws, does not make the insurance effective at that time, contrary to a by-law making it effective from the secretary's receipt of the application.
5. The bond of the agent reciting that he is appointed to solicit and write insurance, but further providing that he shall not solicit or accept insurance except in accordance with the by-laws, does not make the insurance effective from the date of the application, contrary to the by-laws.
6. Whether the company or the agent is liable in tort for unreasonable or unnecessary delay in forwarding the application is not decided, and the case will not be remanded for a trial of that question, under sec. 2836*b*, Stats., especially as the present judgment would not be a bar to such an action.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The appeal is from a judgment of nonsuit.

The plaintiff lived in the city of Grand Rapids and about

ten miles distant from his farm in the town of Grant in the same county, upon which was a small dwelling house and barn, in the latter of which was stored a considerable quantity of hay which he desired to have insured. He had on other occasions and at the time in question carried insurance with said company.

Some doubt having arisen as to the insurability of the barn and its contents on account of the dwelling being then vacant, plaintiff discussed the matter with the president and secretary of defendant company and was advised by them that his barn would be considered an insurable risk and to make application for insurance to one William Gaulke, agent for said company in said town. October 21, 1916, the plaintiff, with said agent, made out an application upon the printed forms furnished by defendant for insurance in the sum of $600 for a term of five years and to be effective as of that date, and at the same time gave Gaulke his check for $2.63, which was the amount fixed by the defendant to be paid on such application as a premium and included a commission to said Gaulke. The agent at the same time told the plaintiff that his barn and hay were insured and that he would get the policy in about two weeks. The check was immediately cashed by Gaulke.

November 2, 1916, the barn and hay were destroyed by fire. On the following day the plaintiff called on the secretary of the company and gave notice of the fire. Afterwards on the same day the secretary received from the agent a letter with the application and with information from the agent to the effect that after taking the application on the 21st of October the agent found that a stovepipe in the dwelling on plaintiff's farm ran through the side wall on the house, making the property uninsurable under the by-laws of the defendant. That the agent had suggested that there could be a possible acceptance of the application by putting a sewer pipe out through the wall and running the stovepipe

through that, and that he had written the plaintiff with reference to that situation and that he had just heard that the barn had been destroyed.

On October 31st Gaulke had written to the plaintiff with reference to the application for insurance as follows:

"I have thought the matter over and have come to the conclusion that in order to be sure that the company will accept your application, the best thing to do would be to build a small chimney; it can be put on brackets and will only take a few brick, twenty-five to a foot in height. If I were in your place I would do that. If, however, you wish to have me send in the application as we made it, I will do so, but I fear that they will turn it down. Let me know in regard to this matter by dropping me a line, as I likely will not be in town until next Saturday."

The by-laws of the defendant were printed on the back of the policies issued and contained the following provisions:

No. 4. "It shall be the duty of the secretary to keep a record of the proceedings of the meetings of the board of directors and of the annual meetings." "To receive applications for insurance."

No. 7. "Each person wishing to become a member of this company on making application shall pay such percentage in cash as may be required by the board of directors; if his application is approved a policy shall be issued to him for a term of five years, . . . the agent taking such application or renewal shall be entitled to a policy fee of $1. . . ."

No. 10. "As soon as the application is received by the secretary the company shall be liable for all losses sustained by applicant until the application is refused and placed in the postoffice directed to the applicant."

No. 9. ". . . All buildings having an iron stovepipe for a chimney or being exposed by 'stovepipe risks' are not insurable; any person making a false statement in regard to the above shall forfeit all rights under his policy."

No. 14½. "Vacant farm buildings may be insured, if in the judgment of the authorized agents of this company such risk should be assumed."

The application furnished by defendant and used by plaintiff contained the following question to be answered by any applicant: "9. Are there any stovepipes within 100 feet of risk?"

The secretary not having received the application until after the fire occurred, no policy was issued. The $2.63 paid by plaintiff was offered back to him.

For the appellant the cause was submitted on the brief of *W. E. Wheelan* of Grand Rapids.

For the respondent there was a brief by *Goggins, Brazeau & Goggins* of Grand Rapids, and oral argument by *Theo. W. Brazeau.*

ESCHWEILER, J. The defendant is a town mutual fire insurance company organized under the provisions of secs. 1927 to 1941, Stats.

Sec. 1927, relating to the organization of such corporations, provides that the persons subscribing to original articles and such as shall afterwards be insured shall be a corporation; and sec. 1933 provides that every person to whom any policy is issued by such corporation shall be deemed a member of the same.

The plaintiff, by reason of other insurance held by him at the time of his making the application involved in this case, was a member of such defendant corporation. Being such member, he is chargeable with knowledge of the conditions of insurance as they are determined by the by-laws of such corporation. *Bretzlaff v. Sick Ben. Soc.* 125 Mich. 39, 83 N. W. 1000; *Davidson v. Old People's M. B. Soc.* 39 Minn. 303, 39 N. W. 803; *Supreme Lodge of K. P. v. Graham,* 49 Ind. App. 535, 97 N. E. 806; *Brashears v. Perry Co. F. P. Ins. Co.* 51 Ind. App. 8, 98 N. E. 889.

The court below was therefore right in holding that under by-law No. 10, above quoted, it was essential that the application for insurance should at least have been received by

the secretary before any liability could be fastened upon the defendant for any loss occurring subsequent to the date of the application and prior to its receipt.

There is nothing in the record here upon which could be predicated a waiver of such provisions of the by-laws as in the case of *Ledebuhr v. Wis. T. Co.* 112 Wis. 657, 88 N. W. 607.

Such membership also prevents him from successfully asserting, in the face of such positive restriction as is embodied in this by-law, the well recognized doctrine of the validity of parol contracts of insurance between a stranger and an insurance company, as in such cases as *Whitman v. Milwaukee F. Ins. Co.* 128 Wis. 124, 107 N. W. 291, and cases cited; *King v. Hekla F. Ins. Co.* 58 Wis. 508, 17 N. W. 297; *McQuaid v. Ætna Ins. Co.* 226 Mass. 281, 115 N. E. 428.

Appellant urges that the last sentence of sec. 1933, Stats., which reads as follows: "He shall also, at the time of effecting such insurance, pay such percentage in cash and such reasonable sums for a policy as may be required by the rules or by-laws," evidences a statutory declaration that the insurance by such a corporation as this, and to which said section relates, becomes effective at the time of such payment and the signing and delivering to the agent of the application, subject only to the right of cancellation or refusal of the application and the returning it to the applicant under by-law No. 10, above quoted. We cannot so construe it nor see that force is added to appellant's suggestion in that behalf by the provisions of the bond required of and given by the agent containing the recital that such agent was chosen and appointed "for the purpose of soliciting and writing insurance for said company," for the same bond recites further that such agent "shall not solicit or accept insurance, except in accordance with the by-laws of said company." This requires the affirmance of the judgment of the court below upon the record as it then stood.

Whether or not an action in tort might be maintained against the defendant company or its agent for what might be held to be a possible breach of a duty to forward such application without unreasonable or unnecessary delay after the receipt of the application and premium by the agent, is a question which we do not care to determine upon the present record. Neither do we feel that we should remand this case under the provisions of sec. 2836*b* for such purpose, especially as the present judgment in this contract action would be no bar to such a tort action if the facts warrant such.

By the Court.—Judgment affirmed.

SEDGWICK, Respondent, vs. BLANCHARD and another, Appellants.

October 8—November 4, 1919.

Contracts: Termination of rights by provision for forfeiture: Right to negotiate after breach with party in fault: Appeal: Res adjudicata: Decision on different facts.

1. If the facts on which the present judgment is predicated are substantially different from the allegations of the complaint, the former decision of this court on such complaint upholding its sufficiency is not *res adjudicata,* and the present record, on an appeal from a judgment for the plaintiff, must receive original investigation.
2. Where a father agreed with his son to convey eighty acres of land to the son and eighty acres to a daughter if the son would take possession, farm the land, and support the father, and the contract provided that the failure of the son to perform any condition should render it void, a subsequent breach by the son, coupled with re-entry by the father, especially in view of the contract provision, put an end to the contract and all rights created by it in favor of the daughter.
3. After the son's breach of the agreement the father had a right to negotiate again with the son; and the sister, excluded from any right in the land through the termination of the original contract and the making of a new one, cannot complain that the son and his wife should not be permitted to profit by their breach of the original contract.

APPEAL from a judgment of the circuit court for Dunn county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

On the 31st day of December, 1903, H. C. Blanchard, an aged widower, was the owner of a farm, consisting of 160 acres, in Dunn county, Wisconsin. On that day he entered into a contract with his son, *E. B. Blanchard,* whereby the son agreed to at once take possession of said premises and personal property, till the farm, and provide the said H. C. Blanchard with support and maintenance. The father agreed "to give to said first party by deed or otherwise, to take effect at the death of said second party," the east eighty acres of said farm, and to *Edith Sedgwick* (plaintiff herein and daughter of H. C. Blanchard) the west half of said farm. It was further agreed in said contract that any failure on the part of the son to keep and perform any of the conditions thereof on his part to be performed should render said contract null and void, and that thereupon, on demand, said son should at once deliver to said father possession of said premises as well as the personal property. The said H. C. Blanchard died March 23, 1915. This action was commenced by *Edith Sedgwick,* daughter of H. C. Blanchard, to compel the conveyance to her by *E. B. Blanchard* and wife of the west eighty acres of said farm.

The complaint alleged the making of the contract above mentioned, the relation of the parties, that soon after the making of the contract "*Ernest B. Blanchard* entered into the possession of said real estate and the said personal property under the said contract and H. C. Blanchard commenced living with said *Ernest B. Blanchard,* as provided in said contract, and the parties to said contract continued to act and live under it until the execution of the deed by said H. C. Blanchard to the defendant *Ernest B. Blanchard* as hereinafter alleged; that on or about the 10th day of March, 1911, the said H. C. Blanchard executed and delivered to the defendant *Ernest B. Blanchard,* under the name of *E. B.*

Blanchard, a conveyance of the said real estate, wherein and whereby for an expressed consideration of one dollar and natural love and affection the said H. C. Blanchard conveyed to the defendant *Ernest B. Blanchard,* under the name of *E. B. Blanchard,* said real estate, upon condition, and provided always, that said *Ernest B. Blanchard,* his heirs and assigns, were to keep, support, and furnish a comfortable home and clothing for said H. C. Blanchard, and give him what money he would require for his own use, and properly care for him, and furnish medical care and attention when needed, and give him a Christian burial after death; and also to pay to this plaintiff, *Edith Sedgwick,* the sum of $1,000, to be paid within five years from the date hereof;" which deed was accepted by the said defendant *Ernest B. Blanchard* and recorded on the 25th day of March, 1915, two days after the death of the said H. C. Blanchard. The complaint then alleges that the said H. C. Blanchard died testate on the 23d day of March, 1915; that the will was admitted to probate and the defendant *Ernest B. Blanchard* was appointed executor thereof; that by said will said H. C. Blanchard devised to said defendant *Ernest B. Blanchard* all of the said real estate, subject to the payment to this plaintiff of the sum of $1,000; that prior to the commencement of this action plaintiff had demanded of defendants that they convey to her the west half of said premises, but that they had refused.

Upon the remanding of the case on the former appeal the defendants answered the complaint and the issues so formed were tried by the court without a jury, resulting in findings of fact and conclusions of law, which will be referred to in the opinion, and judgment was entered in favor of the plaintiff. From this judgment the defendants appealed.

For the appellants there were briefs signed by *C. E. Freeman* of Menomonie, and oral argument by *Mr. Freeman.*

For the respondent there was a brief by *J. R. Mathews*

and *R. E. Bundy* of Menomonie, and oral argument by *Mr. Bundy* and *Mr. N. O. Varnum* of Hudson.

OWEN, J. Respondent contends that the decision of the former case (164 Wis. 421, 160 N. W. 267) is *res adjudicata.* This depends upon whether the facts proved and found by the court substantially differ from the allegations of the complaint. If the facts upon which the present judgment is predicated are substantially different from the allegations of the complaint, then the former decision is not *res adjudicata* and the present record must receive original investigation. *Smith v. Sherry,* 54 Wis. 114, 11 N. W. 465; *Baker v. Madison,* 62 Wis. 137, 22 N. W. 141, 583; *McLennan v. Prentice,* 85 Wis. 427, 55 N. W. 764; *Case v. Hoffman,* 100 Wis. 314, 75 N. W. 945.

The court found that within a few days after the execution of the contract alleged in the complaint the defendant *E. B. Blanchard* and his wife entered into possession of the premises and personal property described in the contract, and for a year and a half faithfully performed the conditions of the contract; that on or about July 8, 1905, the said *E. B. Blanchard* and his wife, *Elizabeth,* having become dissatisfied with the terms of the contract, voluntarily breached the same, left and abandoned said premises, and left the father, H. C. Blanchard, in exclusive control thereof; that about a month later the father, upon promise of making better terms with them, induced them to return to the premises, and on August 8, 1905, they did return to the premises and continued to work and farm the same and to support and maintain the father down to the time of his death, March 23, 1915; that on March 11, 1915, the father executed a deed to the son whereby he conveyed the entire farm to him upon condition that he provide support and maintenance for the father during the remainder of his life and upon his

death pay to the plaintiff, *Edith Sedgwick,* the sum of $1,000.

This circumstance is not revealed by the allegations of the complaint. The complaint alleges that soon after the execution of the contract the defendant *Ernest B. Blanchard* "entered into possession of said real estate and the said personal property under the said contract and H. C. Blanchard commenced living with said *Ernest B. Blanchard,* as provided in said contract, and the parties to said contract continued to act and live under it until the execution of the deed by said H. C. Blanchard to the defendant *Ernest B. Blanchard,* as hereinafter alleged." It then alleges the execution of the deed of March 11th. It will be noticed, therefore, that the record on the prior appeal did not disclose the breach of the contract of July 8, 1905, nor the reentry or repossession of the premises by the father. While mention is made in the opinion on the former appeal of a breach of the contract, it doubtless referred to the execution of the deed of March 11th, which was contrary to the terms and conditions of the contract. It did not refer to the breach occurring, as the court found, July 8, 1905. It is plain that the record before us presents a situation not disclosed by the record on the former appeal and the rights of the parties must be considered in the light of the present record.

Whatever right the plaintiff, *Edith Sedgwick,* has to a conveyance of the eighty acres claimed by her, is referable to the contract of December 31, 1904. As we have seen, the terms and conditions of that contract were never executed. The contract was breached by *E. B. Blanchard,* who left the premises, refused to further perform the conditions thereof, and the father, H. C. Blanchard, was restored to the exclusive possession of the farm and personal property. The contract itself provided that the failure of the said *E. B. Blanchard* to keep or perform any of the conditions thereof

should render the contract null and void. It is difficult to perceive why, in view of that provision in the contract itself, the breach thereof on the part of *E. B. Blanchard,* coupled with a re-entry on the part of the father, did not effectually put an end to the contract and all rights created by it. It is true that this court has gone a great ways in sanctifying contracts made for the benefit of third parties. In *Wetutzke v. Wetutzke,* 158 Wis. 305, 148 N. W. 1088, in a similar transaction between father and son, where the son agreed to pay certain sums to third parties and executed a mortgage to secure such payments, it was held that the relation of debtor and creditor was established between the son and such beneficiaries, which relation could not be changed by agreement between the father and son without the consent of the beneficiaries, and the mortgage executed by the son was enforced against the premises notwithstanding the fact that the premises had been reconveyed to the father when it became apparent that the original arrangement could not be agreeably carried out. That case probably marks the limit which this court will go in enforcing contracts of an executory nature made for the benefit of third parties.

In the *Wetutzke Case* there was no provision in the contract that in case of a breach thereof it should be null and void, nor was there a re-entry pursuant to a breach, which facts distinguish that case from this. It seems plain that the rights of plaintiff in and to the premises, a conveyance of which she seeks, were put at an end upon the termination of the contract by its own terms upon the occasion of the breach thereof by *E. B. Blanchard* July 8, 1905, followed by a re-entry on the part of the father, and that she cannot compel a conveyance thereof.

It is argued by respondent that the defendants should not be permitted to profit by their own breach of the original contract. We fail to appreciate the force of this argument. Upon the breach of the contract the father was in a position

where he was compelled to negotiate with some one relative to the management of the farm in such a way as would assure him his future support and maintenance. It is quite plain that if he had entered into an arrangement with a third party, plaintiff would have had no claims upon such third party. We know of no reason why his right in this respect should be limited to third parties, nor why he and his son might not enter into a new arrangement with the same force and effect that would be accorded an agreement between the father and a third person. The first contract was at an end and had no more existence than though it had never been executed. Being at an end, it could constitute no barrier to the right of the father and son to enter into the new arrangement. It follows from what has been said that the judgment should be reversed.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing plaintiff's complaint.

HILLER, Respondent, vs. TROUT BROOK COMPANY, Appellant.

October 8—November 4, 1919.

Negligence: Building fires on own premises: Questions for jury.

In an action to recover damages for the loss by fire of plaintiff's slaughter-house and personal property, alleged to have been caused by the negligence of the employees of defendant, questions as to whether a fire started by the defendant on its adjoining premises the day before the loss was wholly extinguished on that day, and, if not, whether it spread early the next morning to plaintiff's premises, are *held* to have been for the jury, the evidence being in conflict.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff to recover dam-

ages for loss by fire of his slaughter-house. He claims that the fire by which he lost his slaughter-house originated on property of the defendant adjoining the land on which his slaughter-house was located, and that the fire was caused by the negligence and carelessness of the defendant's employees.

The complaint of the plaintiff sets forth that on the 11th day of May, 1917, he was, and still is, the owner of certain property located in St. Croix county; that on that day defendant's employees intentionally kindled a fire on its land next adjoining the plaintiff's land and so negligently watched and tended said fire that it came into and upon plaintiff's land, and on the 12th day of May, 1917, consumed his slaughter-house, two brood sows, and outfit, implements, and tools contained in and about said slaughter-house, of the value of $1,918.15. The answer of the defendant denies all responsibility for the fire which consumed plaintiff's property.

The case was tried before the court and a jury. In a special verdict the jury found that the fire which defendant started on the 11th day of May, 1917, on its property spread to and burned plaintiff's slaughter-house and property on May 12, 1917; that defendant failed to exercise ordinary care in the management and control of said fire; that such want of care was the proximate cause of the burning of plaintiff's slaughter-house and property, and fixed the damages at $957.

Judgment was entered in favor of the plaintiff and against the defendant for the sum of $957 and costs. This is an appeal from such judgment.

Spencer Haven of Hudson, for the appellant.

C. A. Disney of Hudson, for the respondent.

SIEBECKER, J. It is urged by defendant that no credible evidence was adduced to sustain the verdict. There is no

dispute that defendant's employees set fire on May 11th to the grass and rubbish on defendant's lands; that it spread over its lands, which adjoin plaintiff's premises as above stated, and that a fire spread over the premises adjoining the area burned over on May 11th and destroyed plaintiff's property at about 11 o'clock on the forenoon of May 12th. The controversy between the parties arises out of their conflicting claims regarding the complete extinction of the first fire on the evening of May 11th, and whether or not this fire was carelessly permitted by defendant to continue to burn and spread to the adjoining premises and thus destroy plaintiff's property on May 12th.

We have examined all of the evidence adduced on the trial and find there is some evidence tending to show that the fire of May 11th was wholly extinguished on the evening of that day. We also find testimony of several witnesses tending to show that they observed smoke in the early morning of May 12th at points near the fire line between the areas that were burned over on the 11th and the area burned over on the 12th of May, and that they saw fire spreading during the forenoon of May 12th over the burned area in the vicinity of the fire line of the first day and the plaintiff's premises. No one testified to having been on the ground in the early part of May 12th and to seeing the conditions at the fire line of the May 11th fire as it was last seen in the evening of that day. The evidence thus adduced, when applied to the facts and conditions involved in the case, permits of different inferences to be drawn therefrom regarding the questions whether or not the fire of May 11th was completely extinguished by defendant's employees in the evening of that day, and, if not, whether it spread to the plaintiff's premises on May 12th. If the jury believed that the evidence showed that defendant's employees completely extinguished the fire of May 11th, then they would necessarily have found that plaintiff's property was not destroyed by

the fire of May 11th. We are persuaded that the testimony of the several witnesses testifying to seeing smoke and fire in the forenoon of May 12th in the vicinity of the fire line between the areas burned over on the 11th and 12th of May, in connection with the physical facts showing the area over which the two fires had spread, raised such a conflict in the evidence on the questions whether the May 11th fire was wholly extinguished by defendant's employees or not, and whether it spread in the early part of May 12th to the area embracing plaintiff's premises, that it required the determination of these issues by a jury.

It is urged that the witnesses called by plaintiff, who testified to seeing the fire in the morning and forenoon of May 12th near the fire line of May 11th, were so completely impeached by their contradictory statements and other evidence in the case as to render their testimony incredible as a matter of law. The record does not justify this conclusion. The weight and credibility of the testimony were clearly for determination by the jury and the court properly submitted these inquiries to them. It cannot be said that the verdict is not supported by evidence, and the judgment awarded on the verdict cannot be disturbed.

By the Court.—The judgment is affirmed.

NEW RICHMOND ROLLER MILLS COMPANY, Appellant, vs. ARNQUIST and another, Respondents.

October 8—November 4, 1919.

Frauds, statute of: Part performance of single contract: Sales: Damages on refusal to deliver: Question for jury: Nominal damages.

1. An oral sale, as one transaction, of specified quantities of wheat and barley at different prices per bushel, was a single contract and, under sec. 2308, Stats., delivery of the wheat took the whole contract out of the statute of frauds.

2. Where there was some evidence of substantial damage from a seller's breach of contract, the amount was a question for the jury.
3. A buyer is in any event entitled to nominal damages for the seller's refusal to deliver, and a nonsuit was improperly granted.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *McNally & Doar* of New Richmond, and oral argument by *W. T. Doar.*

For the respondents there was a brief by *Varnum & Kirk* and *O. W. Arnquist* of Hudson, and oral argument by *N. O. Varnum.*

KERWIN, J. This action was brought to recover damages for failure to deliver 900 bushels of barley under an alleged contract of sale. The evidence shows that the parties entered into an oral agreement for the purchase by the plaintiff from the defendants of about 136 bushels of wheat at an agreed price of $2.10 per bushel, and 900 bushels of barley at $1.20 per bushel; that defendants delivered and plaintiff accepted and received under the contract the wheat purchased, being 136 bushels and ten pounds, but defendants refused to deliver the barley.

The court nonsuited the plaintiff on the ground (1) that the contract for delivery of the barley was void under the statute of frauds, and (2) that no damages had been proved.

The contention of respondents in support of the nonsuit is that because the price of wheat and barley was fixed the contract was severable and that the delivery of the wheat did not take the agreement for the sale of the barley out of the statute of frauds. In support of this proposition counsel for respondents relied upon *Nat. K. Co. v. Bouton & Germain Co.* 141 Wis. 63, 123 N. W. 624. The case does not support respondents' contention. The statute relied

upon by respondents, sec. 2308, provides: "Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more shall be void unless: (1) . . . (2) Unless the buyer shall accept and receive part of such goods or the evidences or some of them of such things in action."

The contract under consideration in this case was one transaction. It was a contract for the purchase of wheat and barley, and the fact that the price of each was fixed did not make separate contracts. It was one single transaction and one contract of purchase, hence the delivery of part of the property purchased took the case out of the statute. *Gano v. C. & N. W. R. Co.* 66 Wis. 1, 27 N. W. 628, 838; *Weeks v. Crie,* 94 Me. 458, 48 Atl. 107. In the *Weeks Case* there was an oral agreement to sell a certain amount of hake at $1.65 per kettle and herring at $4.25 per barrel. The herring was delivered and paid for according to agreement and the defendants refused to deliver the hake. The court held that there was but one contract for both herring and hake and the delivery and acceptance of the herring took the hake out of the statute, and whether the negotiations constituted one contract or more was a question of fact which should be submitted to the jury.

In the case at bar there is no dispute in the evidence on the point of whether the negotiations constitute more than one contract. The evidence shows without dispute that it was one separate transaction and constituted but one contract.

We are also satisfied from the evidence that the court below was in error in holding that no damages were proved. There was some evidence in the case of substantial damage and the amount thereof was a question for the jury. But in any event the plaintiff proved a breach of contract and it was entitled to nominal damages, and the nonsuit was improperly granted even if only nominal damages had been shown.

Some contention by counsel for respondents is made that a tender of the barley was made. This claim is wholly without merit and no discussion of the question is necessary. We are convinced that the court below erred in granting a nonsuit, therefore the judgment must be reversed.

By the Court.—Judgment of the court below is reversed, and the cause remanded for a new trial.

STATE EX REL. INGOLD, Respondent, vs. MAYOR AND COMMON COUNCIL OF THE CITY OF MADISON, Appellants.

October 8—November 4, 1919.

Municipal corporations: Notice of petition for making election district into ward: Discretion of council: Mandamus: Enforcement of compliance with duty by council.

1. Failure to publish notice at the time of the filing of a petition to make an election district into a ward will not defeat the right of the petitioners to have the mayor and common council act, if the notice is afterwards published.
2. Sec. 926—8, Stats., makes it mandatory upon the common council of a city, on petition of a specified number of resident electors and freeholders in any election district within a ward, to make a new ward including the territory of the election district, and leaves open as a matter of discretion only the manner in which the new ward shall be created, either by making it entirely of the district or by adding other territory, so that *mandamus* to compel the council to act on the petition is not an attempt to control or regulate the manner in which the council shall exercise that discretion.
3. Where there is a plain duty on the part of an official body such as the council of a city, compliance therewith may be enforced by *mandamus*.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment directing a peremptory writ of *mandamus*.

A petition was filed with the common council of the city

of Madison by relator and others, resident electors and freeholders of the third election district of the Sixth ward of said city, to make and constitute such district a ward of said city pursuant to sec. 926—8, Stats. Such required action was not taken, and upon application to the court below an alternative writ of *mandamus* was issued to the mayor and common council. A return was made averring, among other things, that in the judgment and opinion of such answering defendants, constituting more than four fifths of the members of the common council, it would be unwise to increase the number of wards in the said city and that the best interests of the city require that if any action be taken at all that the city be redistricted into wards so that the number of such wards shall be ten or less, and that the said third precinct of the Sixth ward should not be made a separate ward, but should be included with other territory in the creation of a ward; that the petition aforesaid had been considered by the judiciary committee of said common council, and that prior to the commencement of these proceedings a report had been made by said committee and adopted by said common council to the effect that in order to accomplish the end sought to be accomplished by said petition a rearrangement should be made of the ward lines of the several wards by enlarging some of the smaller wards so that the whole number of wards in the city should not be increased, but that the population of the respective wards be more nearly equalized.

They further answered that the division of the city of Madison into wards requires considerable time to get the necessary information in order to make an equitable division of such wards, and that the common council had the matter under consideration and has not been able to arrive at a determination as to the proper redistricting of the city.

Through oversight, notice was not published of the filing of the petition as provided in the Statutes at the time the petition was originally filed, but such notice was published after the commencement of these proceedings.

Upon hearing the circuit court determined that more than a reasonable time since the petition was filed had passed within which the common council might have acted upon said petition, and directed the issuance of the peremptory writ of *mandamus* commanding the defendants to forthwith proceed to act upon the said petition and to create a new ward in accordance with the statutes.

From such judgment or order the defendant mayor and members constituting more than a majority of the common council appeal.

The cause was submitted for the appellants on the brief of *William Ryan* of Madison, and for the respondent on that of *Aylward, Davies, Olbrich, Brown & Siebecker* of Madison.

ESCHWEILER, J. Sec. 926—8, Stats., provides in substance that upon the petition of a specified number of resident electors, freeholders of any one election district within any ward subdivided into two or more election districts or of any undivided ward within any city of the third or fourth class incorporated under special charter, demanding that such election district be constituted a ward, or such ward be divided, such council shall, after proper publication, proceed by ordinance to create such district and any other district or districts in such ward into wards or to divide such ward into wards, provided that the council may, by a vote of at least three fourths of all its members, change the boundaries of such district or of such proposed ward.

Defendants contend that the failure to cause notice of the filing of such petition to be published as is required by said statute was a prerequisite to their obligation, if any, to act, and further that the required action involved the exercise of a legislative discretion vested in the common council as a legislative body and therefore not subject to such control as was here attempted by the writ.

The notice, however, is for the purpose of conveying in-

formation of the request to others than the members of the common council and who may be interested, and where, as here, such notice has been given, the prior lack of it cannot defeat the petitioners' right.

The statute makes it mandatory upon the common council to make a new ward in the city which shall include the territory within the election district. It leaves open as a matter of discretion only the manner in which such new ward shall be created, namely, either by making it entirely of such election precinct or by adding other territory to the same. The writ herein does not attempt to control or regulate the manner in which the common council shall exercise that discretion, but only effectuates the mandate of the statute.

Where there is a plain duty as here involved, it is a well recognized and long established doctrine that compliance therewith may be enforced by *mandamus*. *State ex rel. Burnham v. Cornwall,* 97 Wis. 565, 73 N. W. 63; *State ex rel. McGovern v. Williams,* 136 Wis. 1, 116 N. W. 225; *State ex rel. Husting v. Board of State Canv.* 159 Wis. 216, 150 N. W. 542; *People ex rel. Rapid Transit S. C. Co. v. Craven,* 210 N. Y. 443, 449, 104 N. E. 922; *People ex rel. Cayuga Nation v. Land Comm'rs,* 207 N. Y. 42, 50, 100 N. E. 735.

By the Court.—Judgment affirmed.

SIEBECKER, J., took no part.

BRANEGAN and another, Administratrices, Respondents, vs. TOWN OF VERONA, Appellant.

October 9—November 4, 1919.

Highways: Whether defective or not: Absence of barriers: Question for jury: Contributory negligence of driver of automobile: Trial: Instructions requested substantially covered by judge's charge.

1. In an action against a town for damages for the death of plaintiffs' decedent, due to his automobile running off the bank of a turnpike, the question whether the absence of a railing or barrier rendered the highway unsafe is, under the circumstances, for the jury.
2. Almost innumerable circumstances, such as the topography of the locality, the development of the community, the standard of road construction therein attained, the amount and character of traffic, etc., are to be taken into consideration in determining whether a given condition renders a highway defective.
3. That decedent, whose death was due to his automobile running off the bank of a turnpike, turned from the beaten track a few inches when the road presented a muddy appearance, did not make him guilty of contributory negligence as a matter of law.
4. In order to satisfy the requirement of reasonable anticipation of injury to a traveler on a highway it is not necessary that the town board should have foreseen that the accident which happened might occur because of the absence of a barrier, the test being whether they should have foreseen that a vehicle running along the highway might be precipitated over the bank.
5. The court having charged the jury that "the defendant was in duty bound to keep so much of the width of the highway in such condition that it was reasonably safe for public travel over it with an automobile driven by persons while using ordinary care," which was substantially a correct statement of the law, the refusal to give a requested instruction that the defendant town "has performed its duty if it properly grades and prepares a part of the highway of reasonable width and keeps the same in a suitable condition for the use of passengers, either on foot or in a conveyance," is not reversible error.

6. Permitting respondents' attorney to cross-examine his own witness was a matter peculiarly within the discretion of the trial court and cannot work a reversal of the judgment.

APPEAL from a judgment of the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Affirmed.*

Action for damages occasioned by an alleged defective highway. On the 16th day of June, 1917, plaintiffs' deceased was driving a Ford automobile north on the highway in question. He and his daughter *Gladys* were the only occupants of the automobile. The accident happened on a grade or turnpike in a ravine or depression between two hills or declines. The traveled portion of the grade or turnpike was ten feet wide. The turnpike was slightly elevated above the surface of the ground on the east side of the highway, but on the left side of the highway there was an abrupt decline to a distance of three and a half or four feet. The west wheel track was within a distance of three inches of the edge of the grade. Grass was growing on this three inches. Grass and weeds growing up on the side of the decline grew up even with the grass growing on the grade, obscuring the fact that the sharp decline was there present. There were two wagon or automobile tracks on this grade, one of which straddled one of the wheel tracks of the other. As the deceased came down the hill from the south the traveled portion of this grade or turnpike presented a muddy appearance, especially on the west side. He kept well to the left. According to the testimony of the daughter the right-hand wheels were on the edge of the grass. According to other witnesses the right-hand wheels of the automobile were out in the grass a distance of from twelve to eighteen inches; one witness for the defense testifying that the right-hand wheel was running "just off on the east edge of the bank there on a wheel track that was out there. It was right off, just a few inches east of the black dirt; right along there in the dirt; there was a wheel track there, and it was running in that."

It appears that at a point in close proximity to the place

where the accident occurred a small drain or gutter extended transversely across the traveled track a distance of about three or three and a half feet. It extended through the grass shoulder to lower ground. From the east edge of the shoulder where the gutter was about a foot across and five and a half inches deep, it extended into the traveled track a distance of three or three and a half feet, growing shallower and less pronounced. The evidence tends to show that when the front wheels of the automobile encountered this drain or gutter the automobile took a decisive turn to the left, sheered across the turnpike to the west side, where it ran off the west bank and overturned. The daughter was sitting on the right-hand side and was thrown clear of the automobile. The deceased, sitting on the left-hand side, was pinned beneath the automobile and died before he could be rescued. When the automobile overturned it was headed in a direction horizontal with the traveled track.

The jury returned a special verdict by which it was found (1) that the highway in question was not reasonably safe for public travel; (2) that such unsafe condition was the proximate cause of the death of the deceased; (3) that such unsafe condition had existed a sufficient length of time prior to the accident so that the defendant town in the exercise of ordinary care ought to have discovered its condition; (4) that the deceased was not guilty of contributory negligence; and (5 and 6) assessed damages. The court ordered judgment in favor of the plaintiffs on the verdict, from which judgment the defendant town appealed.

William Ryan of Madison, for the appellant.

For the respondents there was a brief by *Gilbert & Ela* of Madison, and oral argument by *F. L. Gilbert.*

OWEN, J. The defendant town urges reversal of the judgment because, as claimed, the evidence shows that the highway was reasonably safe for public travel; that the deceased was guilty of contributory negligence; that if the

highway was defective such defect was not the proximate cause of the accident; and because of refusal to charge the jury as requested.

It is undisputed that there was a sharp decline on the west side of the turnpike, which decline extended downward a distance of three or three and a half feet; that one of the wheel tracks came within three inches of the edge of this decline, and that no railing or barrier existed thereat to protect vehicles from going over the bank. The accident occurred because the automobile driven by deceased went over the bank and was overturned.

It is claimed by plaintiffs that the absence of a railing or barrier at the point in question rendered the highway defective and unsafe for public travel. In *Miner v. Rolling*, 167 Wis. 213, 167 N. W. 242, it was urged that the absence of a railing or barrier under similar circumstances rendered the highway defective as a matter of law. That contention was rejected, but it was held to be a jury question. So we must hold here. The dangers attending a very slight deviation from the traveled track on the west side of this turnpike are quite apparent, and the jury were entirely justified in finding that the highway was defective and unsafe for public travel as a result of the absence of a barrier or railing along the west side of the turnpike. Palpable cases may arise where the court can say that the absence of a barrier or railing along the edge of a highway does or does not constitute a defect as a matter of law. But, as a general rule, that is a jury question.

As was pointed out in *Wheeler v. Westport*, 30 Wis. 392, almost innumerable circumstances, such as the topography of the locality, the development of the community, the standard of road construction attained therein, the amount and character of traffic, etc., are to be taken into consideration in determining whether a given condition renders a highway defective. Such is still the law. That which will render one highway defective will not condemn another. Where the

building of a primitive dirt road strains the resources of a town, defects will be tolerated that will render another maintaining a concrete highway liable for damages. If in the development of the state accepted standards of road building require barriers at places such as we are considering, the legislature may so declare. Until then it must remain, as a general proposition, a question to be decided by a jury, and towns leave such questionable places unguarded at their peril. That portion of the verdict which finds that the highway was not reasonably safe for public travel cannot be disturbed.

It is urged that the deceased was guilty of contributory negligence because, it is alleged, the duty imposed upon towns requires them to keep only the traveled track in repair, and that his deviation from the traveled track was primarily responsible for the accident. In answer to this we may say, first, that the undisputed evidence does not show that he proceeded outside the traveled track, or at least outside the beaten track. The testimony of the daughter is that the right-hand wheels were on the edge of the grass. But, however that may be, it is certain that the right-hand wheels of the automobile were but a few inches east of the black dirt. A witness for the defendant, referred to in the statement of facts, said: "It was right off, just a few inches east of the black dirt; right along there in the dirt; there was a wheel track there, and it was running in that."

Defendant's counsel refers us to numerous cases in this state in which it is held that a traveler on a highway may not deviate from the traveled track and hold the town liable for injuries sustained at a point not within the traveled track of the highway. There is no case, however, cited to our attention which holds that a traveler on a highway turns from the beaten track a distance of a few inches at his own peril. The cases referred to all involve a complete deviation from the traveled track, the taking of a route entirely separate and apart from the one prepared by the town for

the purposes of travel. They have no application here. It would be laying down a pretty strict, if not an unreasonably harsh, rule to say that a traveler on a highway may not under any circumstances turn the outside wheel of his vehicle into the grass bordering the beaten track without being guilty of negligence as a matter of law. We think that what the deceased did was quite natural under the circumstances. The road ahead of him presented a muddy appearance, although as a matter of fact it was hard and dry. That it was rough and full of ruts is undisputed. He held his machine well over to the right in order to avoid what appeared to him to be a bad spot. If in doing so the wheels on one side of the machine were brought slightly into the grass, it was not such behavior as can be pronounced negligence as a matter of law. *Kadolph v. Herman,* 166 Wis. 577, 166 N. W. 433.

It is said that the town board could not foresee that an accident such as this might occur by reason of the absence of a railing or barrier. That is not the test. It is not necessary that the town officers should foresee that an accident happening just as this happened was likely to occur. It is sufficient if they should have foreseen that an accident might occur; that is, that a vehicle running along the highway might be precipitated over the west bank. Such an occurrence might be brought about by a variety of circumstances, some of which can be reasonably foreseen while others cannot. The fact that the unprotected declivity on the west side of the turnpike endangered the safety of travelers is sufficient to satisfy the requirement of reasonable anticipation.

Appellant also complains because the following requested instruction was not given:

"Towns are not required to keep a country road in suitable condition for travel for its whole width. The town has performed its duty if it properly grades and prepares a part of the highway of reasonable width and keeps the same in a suitable condition for the use of passengers either on foot or in a conveyance."

The trial court did charge the jury that:

"The defendant town of *Verona* was not required to keep all the width of the highway in a suitable condition for public travel at the point of the accident in question. The defendant was in duty bound to keep so much of the width of the highway in such condition that it was reasonably safe for public travel over it with an automobile driven by persons while using ordinary care."

The substance of the request was communicated to the jury in that portion of the charge quoted, which we regard as a substantially correct statement of the law. Certainly the refusal of the court to grant the request to submit the charge requested does not constitute reversible error, in view of the charge given.

Appellant also complains because respondents' attorney was permitted to cross-examine his own witness. This was a matter peculiarly within the discretion of the trial court and cannot work a reversal of the judgment. We see no error in the record.

By the Court.—Judgment affirmed.

CROWLEY, Appellant, vs. FICKS, Respondent.

October 9—November 4, 1919.

Good will: Breach of contract not to engage in business.

One who was the selling agent of a corporation and received as compensation fifty per cent. of the net profits, and to all intents and purposes was the active manager and backbone of the corporation, was "indirectly" engaged in such business, within the meaning of a contract of sale of a similar business wherein he agreed not to again engage in such business, "directly or indirectly," and although he was not a stockholder of the corporation.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action in equity for relief by injunction. Prior to December 26, 1917, the General Paper & Supply Company, a corporation, 100 shares of whose capital stock was owned by the defendant, carried on a wholesale business in paper of various kinds and woodenware at Madison, Wisconsin, and on the day named the defendant sold his said stock, which was of the par value of $10,000, to the plaintiff, agreeing in writing that he (the defendant) would not engage "directly or indirectly in the wholesale trade of wrapping paper, including tobacco paper, paper bags, and woodenware in the city of Madison," and would not engage "directly or indirectly or as a salesman in the wrapping and tobacco paper and paper-bag trade in the city of Madison or within a radius of fifty miles thereof" for five years from the date of sale. The plaintiff claims in this action that the defendant has violated this contract by engaging indirectly in the wholesale woodenware business in the city of Madison and demands that he be enjoined from further violation of said contract.

The facts were not seriously in dispute. Shortly after the contract was signed the defendant engaged in the wholesale woodenware business in his own name in Madison, but on being expostulated with by the plaintiff and taking advice on the subject he discontinued that business about March 1, 1918. At that time he had a stock of woodenware in Madison of the value of about $2,000. He had been arranging with Mr. Hirsig and Mr. Wiedenbeck for the formation of a new corporation to take over his woodenware business at Madison to be called the Charles D. Ficks Company, but the plan was abandoned because of the discovery of the fact that the contract with *Crowley* prevented *Ficks* from engaging in the wholesale woodenware trade at Madison.

About the 20th of March, however, a new corporation called the Madison Hardware Specialty Company was formed, in which Hirsig and Wiedenbeck were the principal stockholders. *Ficks* owned no stock in this company, but

he knew all about the project and had conferences with both Hirsig and Wiedenbeck about it, in which conferences it was agreed that the new corporation should take over *Ficks's* stock of woodenware and that *Ficks* should be employed by it as a traveling salesman to sell woodenware, receiving as compensation fifty per cent. of the net profits.

Both Hirsig and Wiedenbeck had other business, and the woodenware business of the new corporation was very largely conducted by *Ficks*. According to his own testimony he sold from seventy to ninety per cent. of the goods, he was on the road about five days out of the week, but on Saturdays was always in the home office, ordered goods, wrote letters for the company, signed the company's name to letters and orders, and he testified on adverse examination that the management of the business, "so far as ordering from jobbers and manufacturers is concerned," was either left in his hands directly or he suggested to some officer of the company what he wanted in the line of supplies to the stock on hand. On the same examination he testified that Mr. Hirsig was the man who did most of the business, most of the ordering from manufacturers and jobbers, but that he (*Ficks*) in a measure divided the responsibility with him.

The trial court found that the defendant was not engaged directly or indirectly in the wholesale trade in woodenware in the city of Madison and dismissed the complaint, and the plaintiff appeals.

For the appellant there was a brief by *Gilbert & Ela* of Madison, and oral argument by *F. L. Gilbert*.

For the respondent there was a brief by *Bagley & Reed* of Madison, and oral argument by *W. R. Bagley*.

WINSLOW, C. J. We think this judgment must be reversed. The word "indirectly" was inserted in the contract for some useful purpose, not for mere ornament. It clearly indicates that the fact was recognized that effort might be made to evade or render nugatory the agreement by avoid-

ing direct and open participation in a firm or corporation while retaining actual authority and an actual interest in the profits, and that it was proposed to prevent just that thing.

Under *Mr. Ficks's* own admissions we can come to no conclusion but that he was to all intents and purposes the active manager and backbone of the woodenware business of the Madison Hardware & Specialty Company. He was a salesman, it is true, but he was evidently far more than a salesman; he was a salesman with a large interest in and an important share in the management of the business although he was not a stockholder. We can hardly imagine a more typical instance of indirectly engaging in a business than this. *Mr. Ficks* upon his own testimony was, to all intents and purposes, engaged in the wholesale trade in woodenware in the city of Madison though he owned no stock in the corporation under whose name he acted. 22 Cyc. 869.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff in accordance with this opinion.

PAWLING & HARNISCHFEGER COMPANY and another, Appellants, vs. MILDENBERGER and another, Respondents.

October 9—November 4, 1919.

Workmen's compensation: Injury to eye resulting in blindness: Finding of fact by industrial commission.

1. A determination of fact by the industrial commission on conflicting evidence is conclusive upon the courts, under sec. 2394—19, Stats.
2. An award of compensation by the industrial commission for a permanent partial disability equivalent to total blindness of one eye is sustained by the evidence.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought by plaintiff to set aside an award of the *Industrial Commission of Wisconsin.*

The findings of the *Commission* are, in substance, that both applicant and respondent were subject to the provisions of secs. 2394—3 to 2394—31, Stats., inclusive; that on September 18, 1917, *August Mildenberger,* while in the employ of plaintiff and in the performance of duties incident to and growing out of his employment, sustained injuries that resulted in permanent partial disability, or total blindness of the left eye. The *Commission* awarded *Mildenberger* the sum of $1,209.04.

Plaintiff contends that prior to the accidental injury which resulted in total blindness of *Mildenberger's* left eye the sight of that eye was not to exceed twenty-seven per cent. of normal sight, and that *Mildenberger* for that reason is entitled to an award not to exceed twenty-seven per cent. of the 140 weeks allowed by the schedule for total blindness of one eye.

The circuit court confirmed the award of the *Industrial Commission* and judgment was entered accordingly. This is an appeal from such judgment.

For the appellants the cause was submitted on a brief signed by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* of counsel, all of Milwaukee.

For the respondent *Mildenberger* there was a brief by *Benj. W. Reynolds,* attorney, and *F. P. Hopkins,* of counsel, both of Milwaukee, and for the respondent *Industrial Commission* a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general; and the cause was argued orally by *Mr. Gilman.*

SIEBECKER, J. The plaintiff claims that the *Commission* erred in awarding compensation to the applicant for a permanent partial disability equivalent to total blindness of an eye. The applicant testified to the effect that the injured eye was "all right" before the accident, that he could see all

right and could read with it before the accident. Two doctors testified that the vision of the applicant's left eye for practical use was wholly destroyed by the accident, but that in their opinion, in view of all the facts shown regarding the condition of applicant's eye, he had, prior to the accident, about twenty-seven per cent. normal vision in his left eye. The *Commission* in its determination of the issue of facts presented by the evidence declared:

"With all due respect for the opinion of experts, there was no direct evidence that the applicant's eye was not normal before the accident. Against this [doctors'] opinion, we have the applicant's own testimony to the effect that prior to the accidental injury his left eye was all right. At any rate, the applicant had useful vision in said eye before it was injured. For all practical purposes to him the left eye was performing the functions of a normal eye."

This evidence sustains these conclusions of the *Commission.* The circuit court properly held that this determination of fact by the *Commission,* in the light of the evidence, is conclusive upon the courts under sec. 2394—19, Stats. *International H. Co. v. Industrial Comm.* 157 Wis. 167, 147 N. W. 53; *Borgnis v. Falk Co.* 147 Wis. 327, 359–361, 133 N. W. 209.

It necessarily follows from this that the award of the *Commission* is sustained by the evidence and cannot be set aside by the courts. Under these circumstances we deem it proper to rest affirmance of the award on this ground and omit consideration of other grounds covered by argument of counsel.

By the Court.—The judgment appealed from is affirmed.

FINKE, Appellant, vs. HESS, Respondent.

October 9—November 4, 1919.

Physicians and surgeons: Malpractice: Sufficiency of evidence to require submission of case to jury: Opinion evidence as opposed to positive evidence: Presumption of negligence.

1. One side of plaintiff's face became paralyzed after an operation performed by a physician, which condition might have resulted from a severance of the facial nerve or from other causes. There being no evidence that the nerve was severed, but, on the contrary, the evidence being positive and undisputed that it was not, the court properly directed a verdict for the defendant.
2. The opinion evidence of a physician could not raise a conflict with the positive evidence of defendant and another physician who reopened the wound that the facial nerve was not severed in performing the operation.
3. Proof of bad result from a surgical operation raises no presumption of negligence in this case.

APPEAL from a judgment of the circuit court for Dane county: JAMES O'NEILL, Judge. *Affirmed.*

Robert N. Nelson of Madison, for the appellant.

For the respondent there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

KERWIN, J. Action to recover damages against defendant, a practicing physician and surgeon, for alleged malpractice in performing an operation on the plaintiff on July 7, 1915. It is insisted by plaintiff that the defendant, in performing what is known as a mastoid operation, severed the seventh or facial nerve, which was unnecessary, in consequence of which plaintiff sustained damages.

The case was tried to the court and a jury. At the close of the evidence the court directed a verdict for the defendant. The question involved turns on whether there is evidence sufficient to carry the case to the jury. It is contended by defendant that there is no evidence that the nerve was severed, hence a verdict was properly directed.

Paralysis of the face was shown, and there is evidence that severance of the nerve would cause such condition. But the evidence also shows that the paralysis might well follow an operation skilfully and properly performed from various other causes. It was shown by the evidence that the paralysis might have been caused by a "dehiscence," or by bandaging after the operation, or by cold drafts, and possibly other causes.

True, after the operation it appears one side of plaintiff's face was paralyzed, but in order to warrant the court in submitting the case to the jury there must be some evidence that the defendant severed the facial nerve; and we find none in the record. There is positive evidence, not only by defendant but by Dr. Beck, a Chicago specialist, that the nerve was not severed. Dr. Beck opened up the old scar in an effort to relieve pressure on the nerve and testified that the nerve had not been severed.

Claim is made by plaintiff's counsel that Dr. Beck admitted the nerve was severed. The evidence does not support this contention. The claim is based on evidence of one Mrs. Hagne, but her evidence as to what Dr. Beck said when he was not under oath was not competent except as laying a foundation for impeachment. Moreover, Mrs. Hagne admitted on cross-examination that Dr. Beck might have said that the nerve was injured, not severed.

Some reliance is placed on the opinion of Dr. Boyce. But his opinion could not raise a conflict with the positive undisputed evidence that the nerve was not severed and that other causes existed for the paralysis. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; 2 Moore, Facts, § 1236.

Proof of bad result raises no presumption of negligence in this case. *Wurdemann v. Barnes,* 92 Wis. 206, 66 N. W. 111; *Ewing v. Goode,* 78 Fed. 442.

We are satisfied the court below was right in directing a verdict for defendant.

By the Court.—Judgment is affirmed.

VILLAGE OF WEST SALEM, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

October 9—November 4, 1919.

Workmen's compensation: Courts: Former decision of supreme court controlling.

Where an application made under the workmen's compensation act against a county and a village for the death of an employee terminated in an award against the village, which, except as to the amount, was affirmed on appeal, and upon the return of the record the industrial commission denied the request of the village that the county be made a party and entered a final award which was also affirmed on appeal, the former decision, although not *res adjudicata* because the county was not a party to the proceedings, was binding under the doctrine of *stare decisis;* and the judgment of the circuit court affirming an order of the industrial commission dismissing a subsequent petition of the village that the county pay part of the award is affirmed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to review an order of the *Industrial Commission.* It appears that one William Voeck was engaged in assisting the marshal of the village of *West Salem* in an attempt to hold one Jones, then in the custody of Weingarten, a deputy sheriff of *La Crosse County,* under circumstances fully set out in *West Salem v. Industrial Comm.* 162 Wis. 57, 155 N. W. 929. The widow of Voeck instituted a proceeding under the workmen's compensation act, which was begun originally against the village of *West Salem* and *La Crosse County.* At the first hearing, in some informal way *La Crosse County,* then appearing by its district attorney, was dropped from the proceeding and does not further appear, except as hereafter stated. A proceeding before the *Industrial Commission* resulted in an award of $3,000 in favor of the widow. The village brought an action to review the award. The circuit court affirmed the award

made by the *Industrial Commission,* except as to the amount. The village appealed from the judgment of the circuit court to this court, and this court affirmed the judgment. After the return of the record to the *Industrial Commission* and after some proceedings had been had before the *Industrial Commission,* the village filed a petition asking that *La Crosse County* be made a party to the proceedings. The *Industrial Commission* denied the petition. The recitals in the order denying it are in part as follows:

"The application for death benefit was made against the village of *West Salem.* Formal hearing was had and award was entered on February 5, 1915, requiring the village of *West Salem* to pay to the applicant death benefit in the sum of $3,000. Thereafter the determination of the *Commission* was reviewed by the circuit court for Dane county and the supreme court of Wisconsin, and the findings of the *Industrial Commission* as to all jurisdictional facts were upheld. The *Industrial Commission* erred only in the fixing of the wage upon which the death benefit was to be computed, and the proceedings were remanded to the *Commission* with direction to determine the amount of death benefit in accordance with the directions of the court. The liability of the village of *West Salem* became fixed, and, as we view the matter, no jurisdiction was left with the *Commission* to find liability otherwise."

A final award was then made, and the village brought an action in the circuit court for Dane county to review the second award, including the refusal of the *Commission* to make *La Crosse County* a party to the proceeding. The circuit court affirmed the action of the *Commission* in refusing to make *La Crosse County* a party, and affirmed the award, and from the judgment of the circuit court the village appealed.

By stipulation of the parties the judgment of the circuit court was affirmed, without hearing, in the supreme court.

In August, 1917, the village began this proceeding before

the *Industrial Commission of Wisconsin* against the county of *La Crosse,* and asked that the county of *La Crosse* be required to answer the petition and required to pay the village one half of the award.

The *Industrial Commission,* upon hearing, dismissed plaintiff's petition, and this action was begun in the circuit court to review the order of the *Industrial Commission* dismissing the petition. This appeal is taken from the judgment of the circuit court affirming the order of the *Industrial Commission.*

For the appellant there was a brief by *Baldwin & Bosshard* of La Crosse, and oral argument by *C. L. Baldwin.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. We do not find it necessary to consider the question of the jurisdiction of the *Industrial Commission* in the premises. Under the *stare decisis* rule it must be held that the judgment of this court affirming the judgment of the circuit court, which affirmed the order of the *Industrial Commission,* refusing to make *La Crosse County* a party, is conclusive upon the plaintiff here. The matter is now before us upon the same record that was before the court in the second appeal. While *La Crosse County* was not a party on the second appeal, for the reason that the *Industrial Commission* declined to entertain the petition of the plaintiff asking that *La Crosse County* be made a party, the facts presented are identical, and the claims made by the plaintiff upon such facts are the identical claims presented by the plaintiff in the second action to review the findings of the *Industrial Commission.* While the former decision is not technically *res adjudicata* because *La Crosse County* was not a party, under the rule of *stare decisis* the plaintiff here is nevertheless concluded and cannot retry the same question

upon this appeal. *Cawley v. La Crosse City R. Co.* 106 Wis. 239, 82 N. W. 197; *Lonstorf v. Lonstorf,* 118 Wis. 159, 95 N. W. 961; 15 Corp. Jur. p. 916, § 304.

In this case we do not find it necessary to consider or discuss the effect of the first judgment affirming the finding of the *Industrial Commission* that the village of *West Salem* was the employer of Voeck.

By the Court.—Judgment affirmed.

STATE EX REL. JOHNSON, Appellant, vs. BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF THE CITY OF MADISON, Respondent.

October 9—November 4, 1919.

Municipal corporations: Fireman's pension on retirement because of disease.

In view of secs. 959—46*m* and 959—46*n*, Stats., the legislative intention, under sec. 959—46*l*, was to exclude from the right to a pension any member of a fire department who must be permanently retired prior to twenty-two years of service because of a disability or disease which is not so contracted that it can properly be said to have some causal connection with his line of duty as a fireman.

APPEAL from an order of the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Affirmed.*

The appeal is from an order quashing an alternative writ of *mandamus.*

The relator entered the service of the city of Madison as fireman in 1902, continuing therein and to contribute to the firemen's pension fund as provided by law until September, 1918. The fire and police commissioners of said city then notified him that he had been retired from the fire department as of August 30th, and advised him to make application to the pension board for a pension. He petitioned the trustees of such fund for a pension on the ground that he had

become permanently disabled from performing his duties as such fireman and that he had been retired from service by reason of such disability.

Pursuant to the provisions of the law he was examined by Dr. Evans in December, 1918, who reported as follows:

"1. *Ovey Johnson* is physically permanently disabled so as to render necessary his retirement from service of the fire department, the cause of disability being arteriosclerosis, fibroid myocarditis and hypertension (hardening of the arteries), inflammation of the heart muscle, and high blood pressure.

"2. Such disability was not directly caused by duty as a fireman, though such duty may have been a factor in the rapid progress and early development of changes in the heart and blood vessels, which are more frequently seen at a later period of life."

The statute under which relator claims is as follows:

"Section 959—46*l*. If any member of a fire department, while contributing to any such fund, shall, while engaged in the performance of his duty as such fireman, be injured or disabled, and found upon an examination by a duly licensed physician ordered by said board, to be physically or mentally permanently disabled so as to render necessary his retirement from service in such department, such board shall retire such disabled member from service, and upon said retirement the said board shall order payment to such retired member, monthly, from such pension fund, a sum equal to one half of the monthly compensation allowed such member as salary at the date of his injury or disability. And if any such member, disabled to the extent and under the conditions aforesaid, be thereafter discharged, such member shall receive a pension according to the above provisions."

The defendant *Board of Trustees* moved the court below to quash the alternative writ for the reason that neither the petition therefor nor said alternative writ states facts showing the relator entitled to a writ of *mandamus* as prayed.

Upon hearing such motion was granted, and from the order quashing the alternative writ the relator appealed.

The cause was submitted for the appellant on the brief of *Rufus B. Smith* of Madison, and for the respondent on that of *William Ryan* of Madison.

ESCHWEILER, J. The only question involved is whether or not the disease or disability for which the relator was retired from service as a fireman must under the law be of such a nature that it can be said there was a causal connection between his service or duty as such fireman and the disability. In other words, that it occurred because he was a fireman rather than merely while he was a fireman.

By sec. 959—46*m*, Stats., provision is made for an allowance from the same pension fund to any member of such fire department who shall, "while in the performance of his duty, be killed, or die as the result of any injury received in the line of his duty, or any disease contracted by reason of his occupation," and also a further provision that in case he shall die from any cause whatever after ten years of service and leaving certain specified dependents, then relief shall be granted them.

By sec. 959—46*n*, Stats., provision is made for a pension upon retirement by any member of the fire department after twenty-two years of service.

Were the question here involved to be disposed of upon the grammatical texture of sec. 959—46*l*, quoted above, there would be considerable force to the relator's contention that the expressions, "while contributing to any such fund," and "while engaged in the performance of his duty as such fireman," in the second and third lines of such section, merely define two concurrent periods of time within which, when disabling injury occurred, the fireman becomes entitled to a pension, namely, that it must occur during a period of time within which he both contributed to the pension fund and acted as fireman, thereby giving the word "while" the same meaning in each of the above quoted phrases.

A consideration, however, of the pension fund law as an

entirety and therefore the provision here involved in connection with the other provisions of the statute, disclosing that the legislature provided for a pension to the member upon retirement from any cause whatsoever after twenty-two years of service; for relief to his dependents after his death from any cause whatever after ten years' service; for relief to such dependents after death of such member at any time during such service in the performance of his duty as the result of any injury received in the line of his duty, or disease contracted by reason of his occupation, constrains us to hold that the legislative intention was to exclude from the right to a pension any one who must be permanently retired prior to twenty-two years of service by reason of a disability or disease which is not so contracted that it can properly be said to have some causal connection with his line of duty as such fireman. This is the construction which has been given to similar laws in other jurisdictions. *Hutchens v. Covert,* 39 Ind. App. 382, 78 N. E. 1061; *Scott v. Jersey City,* 68 N. J. Law, 687, 54 Atl. 441.

There appearing to be no causal connection between his prior duty and service as a fireman and the unfortunate condition in which the relator has been placed, he cannot be held to be within the provision of the statute upon which he relied.

By the Court.—Order affirmed.

BANNER COFFEE COMPANY and another, Appellants, vs. BILLIG and another, Respondents.

October 9—November 4, 1919.

Workmen's compensation: Effect of failure to obtain medical treatment: Evidence of refusal: Finding of industrial commission.

1. A teamster, kicked by a horse, who applied a salve used by him for slight injuries and continued at work until infection resulted, without consulting a doctor, although advised to do so, did not as a matter of law refuse to adopt such means for

recovery as an ordinarily prudent person would use under like circumstances, so as to defeat his widow's right to compensation.

2. The contention that an employer offered an employee medical attention, which he unreasonably refused to receive, cannot be predicated on a suggestion that he see a named doctor, where he was not told that the employer would pay the doctor or that he was the employer's physician.

3. In this case the evidence is *held* insufficient to show with the certainty essential to overcome a finding of the industrial commission that a teamster kicked by a horse would not have died if he had secured medical treatment at an earlier date.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment affirming an award of the *Industrial Commission* in favor of *Bertha Billig,* widow of Otto Billig, and against the appellants, in the sum of $3,000. The facts appear in the opinion.

For the appellants there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

OWEN, J. On the 19th day of February, 1918, Otto Billig was in the employ of the *Banner Coffee Company* as a teamster. On that day he was kicked by a horse over the shin of his left leg. The injury did not appear to be serious, and Billig continued in the performance of his usual duties until the 27th day of February. In the meantime he applied carbolic salve, a remedy he always used in cases of a cut finger, etc., and bandaged it with a cloth. During the afternoon of February 27th he told a fellow-workman, "I can't do no more; everything is feeling numb; it is my back that shivers." He was told to go home and take care of himself. He went home, and on the same day the company was

advised by a telephone communication from his daughter that he was in serious condition. There was a similar telephone communication on the following day, February 28th, and on March 1st the company's doctor called to see him. The doctor found that he had a severely infected ulceration over the shin of his left leg, about the size of a dollar, with a temperature of 102½. He considered his condition very grave and had him removed to a hospital, where he died on March 4th as a result of infection.

At the time of the accident both the employer and the employee were subject to the provisions of the workmen's compensation act, which provides, among other things, as follows:

"Section 2394—3. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, in those cases where the following conditions of compensation concur: . . .

"(2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment. . . .

"(3) Where the injury is proximately caused by accident, and is not intentionally self-inflicted."

The widow, *Bertha Billig,* filed her application for compensation with the *Industrial Commission.* The *Commission* found "that on February 19, 1918, while in the employ of the respondent, performing service growing out of and incidental to his employment, the said Otto Billig accidentally sustained a personal injury; that as a result of said injury the said Otto Billig died on March 4, 1918; that the death of said Otto Billig was proximately caused by the injury sustained February 19, 1918, and was not intentionally self-inflicted," and awarded the said *Bertha Billig* the sum of $3,000. This action was brought to set aside such award.

It is contended by appellants that the proximate cause of

the death of Otto Billig was his refusal to adopt such means as an ordinarily prudent person would use under like circumstances, the undisputed record showing, as they contend, that the proximate cause of the infection was the failure to have immediate medical attention. To this contention we find two answers, which will be stated, having in mind the rule contended for by appellants that the test is, "Did the injured employee refuse to adopt such means to effect a recovery as an ordinarily prudent person would use under like circumstances?" *Lesh v. Ill. S. Co.* 163 Wis. 124, 131, 157 N. W. 539. First, while conceding that persons highly appreciative of the dangers resulting from infection would at once consult a physician, we cannot say that this is true of the great mass of mankind under the same or similar circumstances. It is matter of common knowledge that strong, healthy men engaged in manual labor frequently give such trifling injuries, which would arouse the apprehension of others, little thought, and in comparison with the number of such injuries the instances followed by infection are not numerous. If they are treated at all, home remedies are applied, just as was done by the deceased. Carbolic salve was his remedy for cuts, bruises, etc., and this he applied. The injury itself was not sufficient to keep him from his work, and he went about the performance of his daily duties, attaching little consequence to the injury. We do not think it is customary for laboring men to rush to a doctor every time they sustain a cut, bruise, or abrasion of the skin, and we cannot say as a matter of law that the conduct of the deceased was not that of the great mass of mankind under the same or similar circumstances.

Point is made by the appellants of the fact that one of his fellow-workmen, immediately after the kick, told him he had better see a doctor. The district manager also testified that he saw him on the morning of February 20th and he told him to go to Dr. Wetzler immediately; that he saw him a few days later and asked him whether he had been to see a doctor

and he said he had been treating himself; whereupon the district manager replied that he thought it would be best for him to go to a doctor and have him examine him, and he, deceased, said he would. The district manager saw him again on the 25th of February, but did not then inquire whether he had seen a doctor, because he assumed he had.

Reversal is not sought on the grounds that the company offered deceased medical attention which he unreasonably refused to receive (*Lesh v. Ill. S. Co., supra*), and, in fact, upon the state of the record, such a contention could not be made, because it does not appear that deceased was told that Dr. Wetzler was the company's physician, or that the company would be responsible for the medical services. In fact, the testimony is that on the 20th the district manager told him to go and see Dr. Wetzler, while at the time of the second conversation he told him he had better see a doctor. In absence of any representation on the part of the company that it would be liable for the doctor's fees, it cannot be said that the deceased unreasonably refused to accept or receive medical services tendered to him by the company, and, as above stated, such defense is not urged. What was said to the deceased, therefore, by his fellow-laborer and the district manager amounted to nothing more than a suggestion on their part that he ought to see a doctor. It goes without saying that their opinion in this respect was no better than that of the deceased. He was in a position to judge of the necessity of consulting a doctor as well as they, and perhaps better.

The second answer to the contention made by appellants is the one made by the circuit court, and that is that it is not at all plain from the record that if he had consulted a physician his life would have been saved. Upon the hearing before the *Industrial Commission* Dr. Wetzler, the company's physician, was asked this question: "If an infection of that kind has started in a day or two after an accident of that kind and the man had obtained medical treatment, it would not be

difficult to clean up an infection, would it? *A.* Well, I won't say. Sometimes even with early treatment a severe type of streptococcic infection will prove fatal in spite of treatment, but those infections then develop almost immediately after the onset of the injury." In view of this evidence it may be said, as the learned circuit judge said in deciding the case, that "no one can say with the certainty that is essential in order to set aside a finding of the *Industrial Commission* that the injured workman increased his disability or met his death because of his failure to secure medical treatment at an earlier date."

By the Court.—Judgment affirmed.

SMITH, Appellant, vs. SCHEIDEGGER BROTHERS and others, Respondents.

October 9—November 4, 1919.

Workmen's compensation: Determination of fact by industrial commission: Employee and his wife not living together.

1. Whether a claimant widow and a deceased employee were living together at the time of his injury, within the meaning of sub. 3 (a), sec. 2394—10, Stats., is a question of fact to be decided by the industrial commission.
2. Testimony tending strongly to show that there was "an actual separation in the nature of an estrangement" between the parties for more than a year and a half prior to the fatal accident, is sufficient to support the finding of the industrial commission that they were not living together at the time of the accident.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award of the *Industrial Commission.* The plaintiff filed a claim before the *Commission,* as the widow of one Solomon Smith, against *Scheidegger Bros.,* a logging firm, on account of the death of said Smith as the result of injuries received by him while at work for

said firm in the woods as a lumberjack. The injury to Smith and his death as a result thereof were admitted, but it was claimed (1) that the plaintiff was not the wife of Smith because she had a previous husband still living from whom she had never been divorced, and (2) that the plaintiff was not living with Smith as required by sec. 2394—10, Stats., and hence was not dependent upon him for support. The *Commission* did not decide the first contention, but held against the claimant on the second contention and dismissed the application.

The evidence showed that the plaintiff married one Munson nearly twenty years ago, by whom she had nine children, five or six of them being feeble-minded; that Munson left her in the spring of 1909 and never returned; that in May, 1912, she claimed to have read in a Rhinelander newspaper that Munson had died in Dakota; that nothing further was heard from Munson, and that in May, 1912, the plaintiff and Smith were in form married and lived together on a farm belonging to Smith until April, 1916, when he went away from her. Regarding this parting the plaintiff testified: "Smith did not like my children and said he wouldn't take care of them, so he went away in April, 1916, and returned at Thanksgiving time, 1916." He stayed but three days at Thanksgiving time and then went back to the woods to work and never returned. His injury was received November 24, 1917, and his death occurred January 20, 1918. The plaintiff did not see her husband after November, 1916, until about a week before his death, when, hearing that he was sick, she went to the hospital where he was lying and remained until his death. Shortly after Smith visited the plaintiff in November, 1916, she left the farm and went to a neighboring village, and worked in a hotel for a short time and later for a private family. The town helped to support her and her family in the summer of 1916. During the year and nine months of Smith's absence he contributed (according to the plaintiff's rather confused testimony) only $35

and some groceries at Thanksgiving time to her support. For eight or nine months prior to his death he contributed nothing, nor did he communicate with her or go to see her so far as the record shows, though he was working for a portion of the time near where she was living. The plaintiff claims that during the week before Smith's death, while he was lying ill in the hospital, they made plans to live together again in the spring. The trial court affirmed the order of the *Commission.*

For the appellant the cause was submitted on the brief of *A. J. O'Melia* of Rhinelander.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondents *Employers Mutual Liability Insurance Company* and *Scheidegger Brothers* a brief was filed by *Brown, Pradt & Genrich* of Wausau.

WINSLOW, C. J. It is plain that the judgment was right. It was a question of fact to be decided by the *Commission* whether the claimant and the deceased were living together within the meaning of the law. *Northwestern Iron Co. v. Industrial Comm.* 154 Wis. 97, 142 N. W. 271. In the present case there was ample testimony tending strongly to show that there was "an actual separation in the nature of an estrangement" for more than a year and a half prior to the accident. This was sufficient to support the finding that the parties were not living together. *Northwestern Iron Co. v. Industrial Comm., supra.*

By the Court.—Judgment affirmed.

SQUIRES, by guardian, Respondent, vs. BROWN, Appellant.

October 9—November 4, 1919.

Master and servant: Stump-puller not within statutory prohibition against operation by minors: Contributory negligence of minor: Constitutional law: Delegation to industrial commission of power to determine what employments dangerous: Costs: Not part of cause of action: Plaintiff and defendant each successful in part.

1. The legislature, in prohibiting the employment of minors in dangerous and unhealthful occupations, had the power to determine which occupations and places of employment were dangerous or unhealthful or could delegate determination thereof to the industrial commission.
2. The employment of a minor as a farm hand in the occupation of pulling stumps with a stump-puller was within sub. 2, sec. 1728*a*, Stats., prohibiting the employment of minors in dangerous or unhealthful occupations, a stump-puller not being an elevator, lift, or hoisting machine, within schedule (b), par. 6, designating the running of "elevators, lifts, or hoisting machines" as dangerous or unhealthful, and agricultural occupations not coming within the prohibition of such statute, in view of sec. 1728*e*, and notwithstanding sec. 2394—41.
3. The child-labor statutes not being applicable to the case, a seventeen-year-old farm hand, injured while pulling stumps with a defective stump-puller, cannot recover in an action against his employer for negligence, where his own want of ordinary care proximately contributed to his injuries.
4. The costs of an action are the creature of the statutes and not a part of the cause of action.
5. In a minor's action against his employer for injuries and for wages, where the employer contested the claim for wages because of the minor's failure to allege emancipation, and agreed, upon the father's relinquishment of the right to wages, in open court, to recovery upon the cause of action for wages, the minor was entitled, under secs. 2918, 2920, 2789, to costs, notwithstanding the failure to recover for injuries, since there could be no apportionment of costs, although each party is successful as to part of the issues tried.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Modified and affirmed.*

This action was brought by the plaintiff to recover damages for injuries alleged to have been sustained by him while in the employ of the defendant. Plaintiff claims to have been permanently disabled by these injuries, which he alleges resulted from the carelessness and negligence of the defendant.

Plaintiff was employed by defendant as a farm hand from January 1, 1917, to December 3, 1917, when the accident resulting in plaintiff's injuries occurred. At the time of the accident plaintiff was seventeen years, ten months, and twenty-seven days of age. When injured he was working on a stump-puller. This machine consists of a drum to which a cable is attached, and which is rotated by means of a sweep. The draft end of this sweep, to which a horse was hitched, is about twelve feet in length, and the opposite, or balance, end projects beyond the drum about seven feet. Plaintiff's duties were to throw the machine out of gear, help pull the cable back, keep the drum clear, and start the horse. While leading the horse and walking between it and the drum the draft end of the sweep broke near the drum and the balance end revolved and struck the plaintiff, causing the injuries complained of. Plaintiff's arm was broken in different places, his hip was fractured, and his thigh lacerated by the sweep. He claims that by reason of his injuries he has lost the use of his hand and arm and that his leg is permanently crippled.

Plaintiff contends that the sweep was old and rotten and not sufficiently strong to resist the pull of the horse and the strain of the rope; that the defendant was negligent in not providing the machine with a safety device known as a "dog," which is usually attached to the drum of a stump-puller, and in case of the sweep breaking prevents the sweep from flying back; that the defendant knew the defective condition of the drum without such safety device, while plaintiff was entirely ignorant of the necessity of such "dog;" and that in operating the stump-puller plaintiff was acting

under instructions from the defendant. Plaintiff also alleged that he has been put to an expense of $1,200 by reason of physician's bills, hospital bills, medicine, etc., and that no part thereof has been paid by the defendant excepting the sum of $375, and that defendant paid the sum of $375 as a part of his liability for the damage sustained by the plaintiff.

For a second cause of action the plaintiff alleges that defendant owes him $275 in wages.

Defendant denies that the stump-puller in question was in anywise defective or out of ordinary working condition or repair and that plaintiff's injuries were caused by any act of negligence on part of the defendant. He alleges that plaintiff was familiar with the use of the defendant's stump-puller and that on the day of the accident plaintiff had been instructed by defendant to walk and keep outside the circle of the machine's sweep when the stump-puller was in action. He claims that plaintiff's injuries were entirely due to failure to obey these alleged instructions. Defendant admits advancing some money towards the defraying of plaintiff's bills, but denies any admitted liability.

The case was tried before the court and a jury. By a special verdict the jury found (1) that defendant failed to exercise ordinary care in providing the stump-puller with safety devices; (2) that such failure to exercise ordinary care was a proximate cause of the plaintiff's injury; (3) that defendant did not fail to exercise ordinary care in providing a sufficient sweep; (4) that defendant failed to exercise ordinary care of providing the device called a "dog;" (5) that such failure to exercise ordinary care was a proximate cause of the injury; (6) that a want of ordinary care on plaintiff's part proximately contributed to his injury.

Plaintiff requested a finding by the court that the employment and place of employment were dangerous and prejudicial to his life, safety, and welfare, and moved for judgment in his favor notwithstanding the verdict; to strike out the

answers in the special verdict, and in the alternative to grant a new trial because of alleged error in the refusal to submit certain questions in the verdict.

Defendant filed motions to change the answers to the first, second, fifth, and sixth questions and for judgment on the verdict as so amended; for judgment upon the verdict dismissing plaintiff's first cause of action; and for judgment notwithstanding the verdict.

The court, among other things, found that at the time of the injury plaintiff was engaged in an agricultural pursuit which involved the use of mechanical power and that the place of employment and the employment were dangerous and prejudicial to the life, health, safety, and welfare of the plaintiff; that by reason of the defendant having removed the safety device from the stump-puller the employment and place of employment were not as free from danger to the life, health, safety, and welfare of plaintiff as the nature of the employment and place of employment would reasonably permit.

The court thereupon made an order denying defendant's motions and judgment was entered in favor of the plaintiff for the sum of $2,897.27 and costs. Appeal is taken from such judgment.

For the appellant there were briefs by *V. H. Cady* of Baraboo, attorney, and *Grady & Farnsworth* of Portage, of counsel, and oral argument by *Daniel H. Grady.*

For the respondent there was a brief by *Grotophorst, Thomas & Quale* of Baraboo, and oral argument by *H. H. Thomas.*

SIEBECKER, J. The trial court held that since the plaintiff at the time of the accident was a minor of the age of seventeen years the rights and liabilities of the plaintiff and defendant arising under the facts and circumstances shown are governed by the child-labor statutes embraced in sub. 2,

sec. 1728*a*, sub. (1) and (11), sec. 2394—41, and sec. 1728*h*, Stats.

The court held that the facts indisputably show that plaintiff was injured while employed by defendant in pulling stumps with a stump-puller; that this employment of plaintiff was an engagement in an agricultural pursuit involving the use of mechanical power; that defendant's negligence in failing to furnish a stump-puller properly equipped with a "dog" or safety device for its safe operation made the employment and place of employment not as free from danger to the life and safety of plaintiff as the employment and place of employment would reasonably permit; and that plaintiff's contributory negligence constituted no defense in the action, because this employment of plaintiff while a minor by defendant subjected defendant to criminal liability for violation of the child-labor law within the rule of *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84, and other cases.

Did the court err in holding that the employment of the plaintiff was in violation of sub. 2, sec. 1728*a?* This statute provides that

"No employer shall employ, require, permit or suffer any minor . . . to work in any place of employment, or at any employment dangerous or prejudicial to the life, health, safety or welfare of such minor. . ."

This provision is followed by others in the same section imposing duties and conferring powers on the industrial commission to ascertain and fix "such reasonable classifications of employments and places of employment" of minors, "and to issue general or special orders prohibiting the employment of such minors . . . and to carry out the purposes of sections 1728*a* to 1728*j*, inclusive, of the statutes." The provisions of secs. 2394—41 to 2394—70 are made a part of this statute so far as applicable and consistent there-

with, to empower the commission to order the classification and for testing the validity thereof and enforcing the same in judicial proceedings, and provide that the penalties prescribed in these last sections shall be applied and imposed for any violation of secs. 1728*a* to 1728*j*, inclusive. These provisions are followed by this clause:

"Until such time as the said commission shall so investigate, ascertain, determine and fix the classifications provided in this section, the employments and places of employment designated in the following schedule shall be deemed to be dangerous or prejudicial to the life, safety, health or welfare of minors under the ages specified," or dangerous to the life, etc., of others where such minor is employed.

A schedule of employments or places of employment dangerous or prejudicial to the life and safety of minors under the ages specified are designated in the act, denominated "a," "b," and "c." These schedules classify minors according to age, schedule "a" embracing those between eighteen and twenty-one years of age. The terms and provisions of this statute indicate that the legislature intended to ascertain, determine, and fix a classification of employments and places of employment which were in fact dangerous or prejudicial to the life, health, safety, and welfare of minors and enumerated them in the appended schedules. It is expressly enacted that such schedules are to remain as the classification until the industrial commission shall, under the powers conferred on it in the Statutes, make a different classification. The commission has not changed the classification so made by the legislature. An interpretation of sub. 2, sec. 1728*a*, requires that all its provisions be construed together, and when so treated it is evident that the legislature condemned the employment of minors and females in what the legislature considered dangerous and unhealthful occupations. To accomplish this result it was appropriate for the legislature to declare which employments and places of employment are within this category. Determination of which employments

and places of employment come within this category was a fact for it to ascertain within its legislative function, or, if it was deemed proper, such determination of fact could appropriately be committed to an agency such as the industrial commission. *State v. Lange C. Co.* 164 Wis. 228, 157 N. W. 777, 160 N. W. 57. The terms and provisions of this statute clearly indicate that the general prohibition of the first sentence in sub. 2, sec. 1728*a*, applies and is restricted to such employments and places of employment as are specified in the schedules as dangerous, or which may be so classified upon investigation by the industrial commission under the powers conferred on it. Concededly this legislative schedule has never been changed by the commission.

It remains to be determined whether or not the facts and circumstances of the case show that plaintiff at the time of his injury was engaged in an employment or place of employment specified in schedule (a), (b), or (c) of this statute.

Plaintiff was a minor under eighteen years of age at the time of the accident and hence can only be included in schedule (b) of sub. 2, sec. 1728*a*. It is contended in his behalf that his employment and place of employment were included in paragraph 6 of schedule (b), which reads as follows: "Elevators; in the running or management of any elevators, lifts or hoisting machines." It is claimed that the stump-puller in question, as described by the witnesses, is a mechanical contrivance commonly known as an elevator, lift, or hoisting machine. We think it manifest that it is not within the class of mechanical contrivances designated as an elevator, lift, or hoisting machine in paragraph 6 of schedule (b). Nor do we find any other designated employment or places of employment in the schedules of this statute that cover and include the plaintiff's employment. The trial court found the plaintiff was engaged at the time of the accident in an agricultural pursuit involving the use of mechanical power and upon that ground held plaintiff's employment was one

included in the prohibition of sub. 2, sec. 1728*a*. This conclusion was arrived at upon the ground that the part of this section declaring that "The terms 'place of employment,' 'employment,' . . ." as used in this section should be construed as defined in sec. 2394—41 of the Statutes. This language in its ordinary significance does no more than import the definition of these terms as there used into sub. 2, sec. 1728*a*. That the legislature did not thereby intend to include any employment in agricultural pursuits within the terms of sub. 2, sec. 1728*a*, is clearly negatived by expressly exempting them therefrom by sub. 4 of sec. 1728*e*, Stats., which declares: "Nothing contained in section 1728*a* to 1728*j*, inclusive, shall be construed *to forbid any child* from being employed *in agricultural pursuits*, nor to require a permit to be obtained for such child." The terms of this provision permit of no inference other than that the employment of minors in agricultural pursuits is not included within the prohibited employments specified in secs. 1728*a* to 1728*j*.

The result is that the rights and liabilities of the parties to this action are not governed by the statutes above referred to respecting the employment of minors, and their rights are governed by the law applicable to persons generally for the recovery of damages for personal injuries proximately caused by the acts of another. The jury has found that the defendant's negligence in failing to furnish a stump-puller with safety devices and guards so as to make it as free from danger to the plaintiff as the nature of the employment would reasonably permit was a proximate cause of plaintiff's injuries. In answer to question 7 they found that a want of ordinary care on plaintiff's part proximately contributed to his injuries. These findings must be accepted as verities in the case. It necessarily follows that plaintiff's contributory negligence defeats his right to recover any damages for the injuries he sustained.

The defendant contends that plaintiff is not entitled to recover the costs in the action which were incurred in the trial

of the cause of action for personal injuries. It appears that plaintiff is entitled to recover the sum of $252.17, the balance due him under the contract for services rendered for the defendant upon the second cause of action alleged in the complaint. It is claimed that defendant did not contest this claim for wages plaintiff had earned and which remained unpaid, but that the complaint failed to allege plaintiff's emancipation and hence that his father was entitled thereto. Upon the trial the father in open court relinquished such right, whereupon it was agreed that the foregoing amount was to be recovered upon the second cause of action. The argument is made that the costs and disbursements incurred in the trial of the case were almost wholly incurred in the trial of the issues arising out of the alleged cause of action for personal injuries, and, since plaintiff cannot recover on this cause of action, such costs cannot be recovered as an incident to the recovery on the second alleged cause of action. Sec. 2918, Stats., provides: "Costs shall be allowed of course to the plaintiff in an action in the circuit court upon a recovery in the following cases, except when otherwise especially provided by law;" and then enumerates wherein they can be recovered. Sec. 2920 provides: "Costs shall be allowed of course to the defendant in the actions mentioned in the two preceding sections *unless* the plaintiff be entitled to costs therein, . . ." It must be borne in mind that the costs of action are the creature of the statutes and not a part of the cause of action. *Two Rivers Mfg. Co. v. Beyer,* 74 Wis. 210, 42 N. W. 232. Under the foregoing statute the plaintiff is entitled thereto upon a recovery in his favor, and the defendant shall recover costs in the action "unless the plaintiff be entitled to costs therein." These provisions clearly indicate that costs shall be awarded to the plaintiff if he obtains any recovery, and that the defendant is entitled thereto only when the plaintiff fails in a recovery in the action. No provision is made for apportionment of costs although each party is successful as to a part of the issues tried. The

only statute bearing on an apportionment of costs is sec. 2789, Stats., which authorizes defendant to offer judgment in writing before trial, and if not accepted by the plaintiff he cannot recover costs from the time of such offer, and must pay defendant's costs thereafter unless he recovers a more favorable judgment. Under statutes like those of this state, courts have held that costs cannot be apportioned between the parties although both succeed in part in the litigation. 15 Corp. Jur. p. 25, § 10 *et seq.*

The plaintiff having recovered in the action, he is entitled to the costs provided for in sec. 2918, Stats., in actions based on contract.

By the Court.—The judgment appealed from is modified by deducting from the whole amount of damages recovered, namely, the sum of $2,897.17, the amount awarded plaintiff as a recovery on his first cause of action as damages for personal injuries, namely, $2,645; and leaving the balance of $252.17 as damages recovered in his second cause of action, together with his costs and disbursements taxed and allowed at the sum of $224.50, making a total recovery of $476.67; and as so modified the judgment is affirmed.

STATE EX REL. CANTWELL PRINTING COMPANY, Respondent, vs. HULL, Secretary of State, Appellant.

October 10—November 4, 1919.

States: "Embossing" as used in statute regulating state printing: Construction of word governed by general usage: Authority of state printer to do embossing under printing contract: Mandamus: Sufficiency of proof of funds to compel issuance of warrant for payment of claim.

1. In view of sec. 4971, Stats. 1917, providing that in the construction of the statutes "all words and phrases shall be construed and understood according to the common and approved usage of the language," the word "embossing" as used in ch. 657, Laws of 1911, as amended by sec. 35.43, Stats. 1917, pre-

scribing a scale of maximum prices for state printing, includes the stamping of titles, names, figures, and designs on the covers of books printed and bound by a contractor for such printing.

2. Such contractor is not concluded by the opinion of the attorney general that "embossing" as used in the statute did not include the work done by him, although he agreed in the contract to be guided by the attorney general's interpretation of the statutes, the determination of the meaning of "embossing" requiring a resort to evidence as to the common usage of the word.

3. The contractor can recover for embossing titles and designs on the covers of books under the contract on account of orders given him by the printing board requiring to be done the work which he did do, though the word "embossing" was not used, and though sec. 35.39, Stats. 1917, provides that no state printer shall be paid for printing not authorized by written order of the printing board or chief clerk of the legislature.

4. On *mandamus* to compel the audit of a claim of the contractor and the drawing of a proper warrant for its payment, under the particular facts a stipulation that there were at all times sufficient funds to the credit of the printing board to cover the cost of printing ordered is sufficient to show that there were funds also in the treasury to the credit of the various departments of the state government to which the printing was chargeable, in view of the presumption that state officers and agents obeyed the law and did not subject themselves to the penalty of sec. 20.75, Stats. 1917.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Mandamus. The relator had a contract with the state during the years 1915-1916 to do all the printing of class 1, legislative printing, and class 3, governor's messages, officers' reports, pamphlets, magazines, bulletins, and acts of officers and societies. The contract was let under the provisions of ch. 657, Laws 1911, as amended. Sec. 20.43 of said chapter, now sec. 35.43, Stats. 1917, prescribes a scale of "maximum prices." The entire section was embodied in a proposal and in a contract between the relator and the state. The prices are specified in great detail under ten heads, among which are: Presswork; Binding, machine thread sewed books, including stock per volume; Binding

blank books, etc.; and Miscellaneous. Under the heading "Miscellaneous" appears the following: "Embossing, per volume ..... .08." It appears that a part of the work the relator was required to do was to impress or stamp certain titles, names, figures, and designs upon the covers of books printed and bound by it. For doing this work the relator charged eight cents per volume, claiming that it was *embossing*. The secretary of state refused to audit the claim of the relator, and this action was brought to compel the secretary of state to audit the claim of relator and to draw the proper warrant for the payment thereof. Relator had judgment in the circuit court, from which the defendant appeals.

For the appellant there was a brief by the *Attorney General* and *J. T. Dithmar,* assistant attorney general, and oral argument by *Mr. Dithmar.*

For the respondent there was a brief by *Gilbert & Ela* of Madison, and oral argument by *F. L. Gilbert.*

ROSENBERRY, J. 1. The main question presented by the record on this appeal is, Did the word *embossing* as used in the statute and contract cover the work done by the relator in impressing or stamping upon the covers of books printed and bound by it, names, titles, etc.? No raised or relief work was done. The impressing or stamping was a depression in the surface of the cover of the book. The contention of the defendant is that the work done was stamping and not embossing, and was therefore covered by the specifications in sec. 20.43, Stats. 1911, as a job of *bookbinding* would be incomplete without the name or title being placed upon the cover. The relator claims that the work is embossing within the meaning of that term as it is used in the contract and statute.

The statute uses the word *embossing,* but does not attempt to define it. It is conceded that no other specification in terms covers the work done by the relator. No other item

in the statute covers stamping or impressing letters, titles, designs, etc., upon the covers of books. All the necessary work is covered by the statute in great detail. At the time the legislature enacted sec. 20.43 it enacted sec. 20.44, which attempted to interpret the provisions of sec. 20.43. Sub. (4) of that section provides that "Folding, stitching, and binding include collating, drying and pressing." As the trial court says, "Had it been the intent of the legislature that binding should include the placing of the title, name, etc., upon the cover; it would have so provided. Instead of doing so it fixed a separate price for embossing, which under the usage of the craft must be held to cover the work of placing the title upon the book." No claim is made that the word *embossing* has acquired any meaning in the law. Sec. 4971, Stats. 1917, provides that in the construction of the statutes of this state "All words and phrases shall be construed and understood according to the common and approved usage of the language." The question is not, How do the lexicographers define the word *embossing?* *Hartford v. N. P. R. Co.* 91 Wis. 374, 64 N. W. 1033. The term *embossing* being one employed in the printing and bookbinding art, resort must be had to those learned in that art for its common and approved usage therein. *Peterson v. Widule,* 157 Wis. 641, 147 N. W. 966; 36 Cyc. 1118. It appears almost without dispute that the word is commonly used in the bookbinding trade to designate precisely the class of work done by the relator for which it has charged eight cents per volume as embossing. While some of the witnesses testified that the word so used is not used with strict technical accuracy, they practically agreed that it is commonly so used. There is nothing in the statute upon which an inference can be based that the legislature intended to use the word in any other than its common and ordinarily accepted meaning. The statute contemplates that printers and bookbinders would use the scale of maximum prices as a basis for bidding, and the legislature must have contemplated that the

word *embossing* would be understood by printers and bookbinders to have the meaning which common and approved usage in the craft has established. *Sharpe v. Hasey,* 134 Wis. 618, 114 N. W. 1118; *State ex rel. McManus v. Trustees,* 138 Wis. 133, 119 N. W. 806. The finding of the trial court that the placing of titles on volumes which the relator printed and bound, pursuant to the contract to do the specified classes of state printing during the years specified, was embossing within the meaning of that term as used in sec. 20.43, Stats. 1911, and in the contract, is amply sustained by the evidence.

2. The contract contained the following clause, also contained in the statute: "And the said party of the second part [relator] further covenants and agrees to be guided by the attorney general's interpretation of chapter 20 of the Statutes." It is claimed that under the rule of *Keachie v. Starkweather D. Dist.* 168 Wis. 298, 170 N. W. 236, relator is concluded by the opinion of the attorney general that embossing did not include the work done by the relator. Without attempting to interpret fully the meaning of that clause, it is clear that the agreement to be guided by the opinion of the attorney general does not constitute the attorney general a trier of fact. The question as to whether or not the work done by relator is embossing, under the circumstances shown in this case, is a question of fact. The meaning of the statute cannot be arrived at solely by the application of rules of construction or interpretation. Resort must be had to evidence. The question is, What is the meaning of the term *embossing* according to the common and approved usage of the language? Being a technical term employed in the arts, proof must be offered in order to establish it. In one sense the statute needs no interpretation; it covers embossing, which it does not attempt to define. The question then arises, How is the word commonly used and understood by those who employ it? Its meaning must be deduced from

the evidence, and the deduction is a conclusion of fact. The clause, therefore, had no application under the facts in this case.

3. Sec. 20.39, Stats. 1913, contains the following clause: "No state printer shall be paid for any printing not authorized by a written order of the printing board or of a chief clerk of the legislature." The orders given to relator by the printing board required the exact work to be done which was done by the relator. The fact that the word *embossing* was not used is immaterial. A thing does not lose its identity because it bears no label. Embossing is embossing whether so designated by the order or not.

4. It is claimed that the relator cannot recover because there was no proof offered that funds were in the state treasury to the credit of the various departments of the state government to which the printing was chargeable, as well as to the credit of the printing board, out of which the relator's claim could be paid. It was stipulated by the parties that there were at all times sufficient funds to the credit of the printing board. The proof went no further. We think that sufficient under the facts in this case. Sec. 20.75, Stats. 1917, provides: "It shall be unlawful for any state officer, department, board, commission, committee, institution or other body, or any officer or employee thereof, to contract or create, either directly or indirectly, any debt or liability against the state or for or on account of any state officer, department, board, commission, committee, institution or other body, for any purpose whatever, without authority of law therefor, or prior to an appropriation of money by the state to pay the same," and provides that violation of the act shall be punished by fine or imprisonment. The cost of the work ordered by the printing board being payable in the first instance out of the revolving fund, in the absence of proof we must presume under the facts and circumstances shown here that the officers and agents of the state have obeyed the law

and have not subjected themselves to the penalty of sec. 20.75.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

MONROE and another, Appellants, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

October 10—November 4, 1919.

Carriers: Railroad commission: Source of powers purely statutory: Supervision of jitneys.

1. Under secs. 1797—62 to 1797—68, Stats., declaring operators of motor vehicles engaged in passenger transportation to be common carriers, and requiring them to obtain a certificate from the railroad commission, but not expressly authorizing the commission to exercise any supervision after issuing the certificate, the commission has no supervisory power as to routes or service, especially as the legislature rejected provisions giving such power and no penalty is imposed for violating new or amended orders of the commission.
2. The railroad commission being a tribunal of purely statutory creation, its powers and jurisdiction must be found in the statutes creating it.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from an order sustaining a demurrer to the complaint.

Prior to the commencement of this action the plaintiffs had been operating motor vehicles for the carriage of passengers for hire in the city of Racine, Wisconsin, under the provisions of ch. 546, Laws 1915, being secs. 1797—62 *et seq.*, Stats. Having given the required bond and made due application for and obtained the certificate provided for in said law from the defendant, plaintiffs respectively paid the license fee required under the ordinance of said city and ob-

tained from its mayor and common council licenses to so operate.

Four routes appear to have been designated by said *Railroad Commission* for the operation of such motor vehicles in the city of Racine on the printed form of applications of the respective plaintiffs, and one of such routes numbered 1, and the territory four blocks east, west, north, and south, was selected by plaintiffs, respectively, as being the general route or territory over which it was proposed to operate such motor vehicles.

The Milwaukee Light, Heat & Traction Company, operating a street railway system in the said city of Racine, made application to the defendant *Commission* requesting that an investigation be made and an order issued authorizing an increase in the fares for street railway service in the said city on the ground that the prevailing rates of fare were inadequate to care for the increased operating costs; and further, that a large number of automobiles carrying passengers for hire, commonly known as jitneys, operated in the city of Racine, and that the service afforded by the same was not adequate or systematized and that the said jitneys are substantially unregulated and untaxed, and that the revenues of said street railway system have been substantially lessened in consequence of such operation.

During the pendency of the hearing of such application the *Commission* on its own motion determined to make further investigation relating to the routes and service prescribed for bonded carriers or jitneys in the said city, with a view of possible change and restricting of the routes in the city of Racine over which said bonded carriers or jitneys may operate, and thereupon gave notice that a hearing would be had before the *Commission* to further investigate said matters and all questions relating to the operation of bonded carriers or jitneys in the city of Racine both as to routes and service, and fixed a time and place for such hearing.

Objection was made on behalf of the plaintiffs and others

similarly situated to the jurisdiction of the *Railroad Commission* to take such proceedings or make any order in the premises with relation to the operation of such motor vehicles.

December 28, 1918, an order was made by said *Railroad Commission* as follows:

"In the matter of the application of the Milwaukee Light, Heat & Traction Company for a revision of the rates of fare on its street railway system in the city of Racine."

"In the matter of the investigation, on motion of the *Commission,* of routes and service of bonded carriers or jitneys within the city of Racine."

"An order was entered in the above entitled matter on September 9, 1918, with respect to street railway rates in Racine, jurisdiction being retained with respect to the routes and service of bonded carriers or jitneys. The *Commission* has kept in touch with the local situation since that time and has made some further study of the routes and service of the bonded carriers.

"At the present time there are no operators on routes No. 2, 3, and 4, and service on these routes has at no time been satisfactorily developed. It appears advisable, therefore, to discontinue these routes, and they are hereby canceled.

"There are at present ten operators on route No. 1. In view of the popularity of this route, no change appears to be advisable. However, until there is further development of other possible routes which would be serviceable to the community, we deem it to be in the interest of the public to restrict the number of operators on route No. 1 to ten.

"A new route is hereby approved and designated as route No. 2. The route is as follows: [description omitted.]

"Until the above described route is developed and occupied by at least ten operators, no further applications for route 1 will be granted, except to fill vacancies caused by the withdrawal of present operators on that route. New routes will be designated from time to time should conditions warrant, and, if necessity therefor arises, further restrictions will be established. Jurisdiction in this proceeding is retained for this purpose."

Thereupon the plaintiffs commenced this action on their

own behalf and on behalf of others similarly situated to have said order set aside, vacated, and declared null and void. The defendant demurred to such complaint, and upon the demurrer being sustained the plaintiffs appealed.

For the appellants the cause was submitted on the brief of *J. Elmer Lehr* of Milwaukee.

For the respondent there was a brief by the *Attorney General* and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker.*

ESCHWEILER, J. The question involved in this appeal is whether there is a general supervisory power of control by the *Railroad Commission* after it has once acted, in issuing the required certificate, over the motor vehicles operating in passenger transportation, commonly known as jitneys.

The text or substance of ch. 546, Laws 1915, creating secs. 1797—62 to 1797—68 of the Statutes, so far as deemed necessary for this case, is as follows:

Sec. 1797—62, Stats., provides that the operator of any such motor vehicle "is hereby declared to be a common carrier, and is hereby required to furnish reasonable and adequate service at just and reasonable rates, and is hereby required to operate over such general routes or within such territory, and during such hours as may be reasonably required for the accommodation of the public in accordance with the following provisions."

Sec. 1797—63 provides that no such vehicle shall be operated until there shall have been filed with and accepted by the *Railroad Commission of Wisconsin* a good and sufficient bond in amounts specified for all damages that may be recovered against the operator of such vehicle by reason of the negligent use and operation of such vehicle. And in case such bond so filed should become inoperative, such vehicle shall not be operated until a bond meeting the requirements shall have been filed.

"Sec. 1797—64. Such bond shall be accompanied by an

application for the acceptance thereof by the railroad commission, which application shall state the name and residence of the applicant, the general route, or the territory, over which it is proposed to operate the motor vehicle described in such bond, the proposed hours of such operation and the rate of fare to be charged for carriage therein.

"If the railroad commission shall determine that such bond complies with the provisions of section 1797—63 and that the rates specified in the application accompanying the same are reasonable for such character of service, and that the proposed general route, or territory to be covered, and the hours of such operation are reasonably adapted to the accommodation of the public, it shall, regardless of any other service now furnished, accept such bond and shall thereupon issue to such applicant a certificate setting forth the fact that the applicant has in respect to the vehicle described therein complied with the provisions of section 1797—63 and section 1797—64.

"Section 1797—65. Every order and determination of the railroad commission under the provisions of section 1797—64 shall be subject to review in the manner provided by section 1797*m*—65 to section 1797*m*—71."

"Section 1797—67. Any person, firm or corporation operating any motor vehicle described in section 1797—62 who shall fail to comply with the provisions of section 1797—63 and section 1797—64 and section 1797—66, shall transport in any such vehicle a larger number of passengers than the number specified in such bond as the carrying capacity of such vehicle, shall charge a rate of fare other than that specified in the application accompanying such bond, or shall fail to operate such vehicle upon the general route, or within the territory, and during the hours set forth in such application, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than ten dollars nor more than one hundred dollars for each offense and in default thereof may be committed to the county jail for not less than ten nor more than ninety days.

"Section 1797—68. Every city, village or town within or through which any motor vehicle described in section 1797—62 shall be operated may require that local consent for the operation thereof be procured and as a condition of

such consent may require reasonable compensation for the repair and maintenance of pavements and bridges, and compensation for the regulation of street traffic, and for any other expense occasioned by the operation of such motor vehicle."

The following situation presents itself:

(1) There is no express language either in the chapter here involved or the law establishing the *Railroad Commission* which provides for any such subsequent supervision and control.

(2) The obligation imposed by sec. 1797—62, Stats., declaring such motor vehicles to be common carriers and requiring the operators thereof to furnish reasonable and adequate service at just and reasonable rates and to operate within such territory and during such hours as may be reasonably required for the accommodation of the public, would indicate that it refers to a continuing service and operation which necessarily, from the nature of such service and the constantly changing conditions, requires modification from time to time.

(3) That unless such power as was exercised by the *Commission* in the instant case is within its jurisdiction there is no other board, commission, or tribunal, except the courts, by which supervisory control could be exercised or the questions as to whether the rates and service are reasonably adequate for the accommodation of the public be determined.

(4) That by sec. 1797—68, Stats., above quoted, the several municipalities in which such service is proposed may give or withhold local consent for their operation, and as a condition to such consent may require a reasonable compensation.

That the hours of operation, the territory to be traversed, and the rates of fare to be charged are all conditions that necessarily are subject to change from time to time and need constant supervision and change, and that the power to determine like questions involved has already been vested by

the legislature in the *Railroad Commission* as to similar questions arising in the much broader fields of general railroad transportation, urban and interurban street railway service, and of the public utilities of the state, are very persuasive in favor of the conclusion reached by the court below that such power is in the *Railroad Commission.*

But the consideration of other matters involved compels us to reach the opposite conclusion.

The advent of such operation of automobiles in the field of common carriers of passengers on the streets of the various municipalities in this state produced a number of bills presented in both houses of the legislature of 1915. They were finally all referred to a joint committee with members from both houses, and public hearings had, and, after rejection of a number of the proposed bills and suggested amendments thereto, the chapter as now found in the sections above quoted was finally reported to the two houses as substitute amendment No. 2 S. to Bill No. 464 S., and adopted.

Among the provisions so presented, considered, and subsequently rejected were the following: (a) In event of the proposed change of routing by the jitneys, a supplemental certificate to such effect was to be issued by the *Railroad Commission;* (b) that in case any such jitney should, without ten days' prior notice thereof to the *Railroad Commission,* at any time abandon its regular schedule, any deficiency thereby caused should not be considered in proceedings involving the sufficiency of street railway service in the same municipality; (c) for the subsequent cancellation by the *Railroad Commission* of such certificate, after notice and application therefor, and then a return of the insurance policy; (d) that before any ordinance should be granted by a city or village for permission to use the streets of such municipality for such service, such certificate should be first submitted to and approved by the *Railroad Commission* as an amendment to sec. 940*b*, Stats.; (e) a proposed amendment to sec. 1797—2, Stats., to provide that all motor ve-

hicles for the carriage of persons for hire for the purpose of affording a means of local street or highway transportation should be within the term "railroad." (Manifestly to bring the vehicles in question here under the general control and regulation of the *Railroad Commission.*)

It is therefore evident that the legislature considered and rejected provisions which would have quite plainly and expressly given to the *Railroad Commission* such power as was attempted to be exercised by it in the present instance.

By sec. 1797—67, Stats., above quoted, express provision has been made declaring certain violations of the act to be misdemeanors and providing for their punishment, but no provision is to be found declaring that a violation of rules, regulations, or provisions made or declared by the *Railroad Commission* subsequent to the issuing of the original certificate shall be so punished.

On the other hand, any railroad by sec. 1797—27, Stats., or public utility by sec. 1797—95, Stats., is subject to a penalty for violating or neglecting or refusing to obey any lawful requirement or order made by the *Commission* or any judgment made by any court upon its application for any such violation, neglect, or refusal.

We should have, therefore, if defendant's construction of the statute were adopted, the somewhat anomalous situation of an operator of such vehicle being subject under sec. 1797—67 to a conviction as for a misdemeanor and a consequent fine for violation of the conditions of the original certificate issued by the *Commission,* and yet not subject to any penalty whatsoever, so far as can be found in this act, for violating any subsequent change of any old or of any new order that might be made by the *Commission.*

The *Railroad Commission* being a tribunal of purely statutory creation, its power and jurisdiction must be found within the four corners of the statutes creating it, and we can find within our statutes no such power or jurisdiction as was attempted to be exercised in the present case, and it fol-

lows therefrom that the demurrer to plaintiffs' complaint should have been overruled.

By the Court.—Order reversed, and cause remanded with directions to the circuit court to overrule defendant's demurrer and for further proceedings according to law.

VINJE, J., dissents.

STORMA, Appellant, vs. WIPPICH, Respondent.

October 10—November 4, 1919.

Assault and battery: Burden of proof of self-defense: Appeal: Erroneous instruction as to burden of proof.

1. Where defendant admits striking the plaintiff, he has the burden of proving the facts which show that he acted in proper self-defense.
2. The evidence being in sharp conflict as to who was the aggressor in a fracas, an instruction erroneously placing the burden of proof as to justification on plaintiff affected her substantial rights.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

Assault and battery. The parties are brother and sister. The plaintiff came to the defendant's house May 1, 1918, and became involved in a violent dispute with the defendant concerning the care of their aged father, who was living with the defendant. Plaintiff claims that the defendant without cause grabbed her and dragged her out of the house, struck her, and pushed her off from the porch. The defendant admitted that he slapped or struck the plaintiff, but claimed that he only acted in self-defense, using no more force than was reasonably necessary under the circumstances to protect himself from plaintiff's prior assault and remove the plaintiff from the sick room of the father, where she was causing a disturbance prejudicial to the health of the father.

The jury returned the following special verdict:

"(1) Did the defendant, *Wippich,* commit the first assault? *A.* No.

"(2) If you answer the first question 'No,' then answer this question: Was the defendant, under the attending circumstances, justified in striking the plaintiff to prevent the latter from striking him? *A.* Yes.

"(3) If you answer question No. 1 'No,' then answer this question: Did the defendant, *Wippich,* use more force than was reasonably necessary in repelling the assault by the plaintiff, *Storma?* *A.* No.

"(4) Was the plaintiff, *Storma,* injured by the defendant, *Wippich,* on the 1st day of May, 1918? A. (by the court). Yes.

"(5) What sum will compensate the plaintiff, *Storma,* for injuries sustained by her on the 1st day of May, 1918, to a reasonable certainty? *A.* $35.

"(6) If you answer question No. 1 'Yes,' then answer this question: Was the first assault committed under circumstances of aggravation or cruelty with vindictiveness or malice, without adequate provocation? (Not answered.)

"(7) If you answer question No. 6 'Yes,' then answer this question: What sum shall the defendant pay as punitive damages? (Not answered.)"

The trial judge charged the jury in connection with question No. 2 that the burden of proof to prove the negative answer to the question was on the plaintiff; also in connection with question No. 3, that the burden of proof to establish an affirmative answer to said third question was on the plaintiff.

Judgment was rendered for the defendant on the verdict, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Eberlein & Larson* of Shawano, and for the respondent on that of *Dillett & Winter* of Shawano.

WINSLOW, C. J. The issue in this case at the close of the evidence was very simple. The plaintiff claimed that the

defendant struck and seriously injured her without provocation; the defendant, while admitting that he struck the plaintiff, claimed that his act was in rightful self-defense. The defendant's claim as set forth in his answer, that he used sufficient force only to remove the plaintiff from his father's sick-room, practically dropped out of the case because the plaintiff's claim to recover was based entirely on a blow or blows which were not any part of the alleged removal from the sick-room.

The law unquestionably is that where, as in this case, the defendant admits the blow, but claims that his act was justified by the law of self-defense, he has the burden of proving the facts which show that he acted in proper self-defense. *Monson v. Lewis,* 123 Wis. 583, 101 N. W. 1094, and cases cited; 5 Corp. Jur. p. 664, § 102.

The conflict in the evidence was very sharp on the question as to who was the aggressor in the fracas, and under such circumstances an instruction which places the burden of proof on the wrong party on the main issue in the case must be deemed in all ordinary cases to affect the substantial rights of the party. *Carle v. Nelson,* 145 Wis. 593, 130 N. W. 467.

By the Court.—Judgment reversed, and action remanded for a new trial.

PROKOPOVITZ, Respondent, vs. KUROWSKI, Intervener, Appellant.

October 10—November 4, 1919.

Fraudulent conveyances: Effect on innocent purchaser of failure to comply with bulk sales law.

1. Where plaintiff sold merchandise in bulk to C., who sold to P., who in turn sold to defendant K., who paid part cash and agreed to pay and afterwards paid the same creditors of C., not including plaintiff, whom P. had agreed to pay, there being no compliance with the bulk sales law (secs. 2317*c et*

seq., Stats.) as to any of the sales, K., if an innocent purchaser for a valuable consideration from P., is not liable on a claim of plaintiff against C. This statute does not render an innocent purchaser for value from a first buyer liable to creditors of the first seller, nor affect his title to the property.

2. Where K., who purchased for full value a stock of goods from P., did not know that C., from whom P. bought, was still indebted to plaintiff for the original purchase price, and K. protected and caused to be paid all known creditors of C., the sale to K. was not fraudulent as to the creditors of C., even though there was no compliance with sec. 2317*c*, Stats., requiring the list of creditors to be verified.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

This action was brought by plaintiff upon notes owing to him by the defendant Chimka. Property in the hands of the intervening defendant, *Joseph Kurowski,* was attached. *Kurowski* claimed ownership, and plaintiff claimed that the sale to *Kurowski* was void as to creditors of Mike Chimka, who had sold the property to Joseph Palka, of whom *Kurowski* bought it; neither sale being in compliance with the bulk sales law.

Plaintiff, *Prokopovitz,* originally owned the stock of merchandise in question. He sold it to Chimka in bulk and took as a part of the purchase price the $300 promissory note which constitutes the first cause of action herein. Neither plaintiff nor Chimka knew of the existence of the bulk sales law and made no effort to comply with its provisions. Six months later Chimka sold the stock in bulk to one Palka, after an inventory had been made in which plaintiff assisted. No effort was made to comply with the bulk sales law. A part of the consideration for the stock was some property in Chicago and the rest was an agreement by Palka to pay certain creditors of Chimka, amounting to $1,958.54. The list of such creditors, with the amounts to be paid by Palka to each, was attached to the bill of sale, but the claims on which plaintiff sued were not in such list.

Palka in turn sold the stock of merchandise to the intervening defendant, *Kurowski.* He paid Palka $840 cash and agreed to pay, and later did pay, as the balance of the purchase price, the same creditors of Chimka whom Palka had agreed to pay. *Kurowski* refused to pay plaintiff's claims, as no note of them was made in the list given to him by Palka. The stock of goods was delivered to *Kurowski,* and plaintiff sued Chimka when *Kurowski* refused to pay his claims, and attached the goods. *Kurowski* intervened, claiming the goods.

The court held that the bulk sales law applies in favor of creditors of the first seller to sales subsequent to the first sale, and that *Kurowski,* although he did not intend to participate in a fraudulent sale and had purchased the stock in good faith for an adequate consideration, is nevertheless estopped from claiming that the bulk sales law does not apply to the sale from Palka to him as against Chimka's creditors. The court found the value of the Chimka goods acquired by *Kurowski* to be in excess of $3,200 and that he had paid claims against Chimka and Palka to the amount of $2,350. Judgment was entered in favor of the plaintiff for the sum of $546.93 damages and costs. The court adjudged that $83.94 of the amount of the costs was incurred by the intervening defendant and constituted a personal liability against him. This is an appeal from such judgment.

The cause was submitted for the appellant on the brief of *Kaftan & Reynolds* of Green Bay, and for the respondent on that of *Eberlein & Larson* of Shawano.

SIEBECKER, J. In addition to the facts referred to in the foregoing statement the court found (1) that the transfer of the goods, wares, and merchandise to *Kurowski* was accomplished by assignment by Palka of the contract of sale and purchase between him and Chimka; (2) that *Kurowski* knew the terms of such transfer of this property and that he knew that the creditors of Chimka specified in both sales to

be paid by the purchaser were not all of Chimka's creditors, and that he was informed before the purchase that Chimka owed plaintiff on the note sued on; (3) that *Kurowski* knew that Chimka and Palka were about to leave the state and that they probably had no property that could be reached by these creditors to satisfy their claims.

An examination of the evidence convinces us that the court erred in finding these facts. The evidence adduced fails to show that *Kurowski* had any knowledge of the terms of sale from Chimka to Palka aside from the fact of transfer and that Palka agreed to pay those of Chimka's creditors who were specified in the list attached to the bill of sale. There is no evidence to show that *Kurowski* knew Chimka owed other debts nor that Chimka owed plaintiff and the bank on the notes involved in this case. The record is also barren of proof that *Kurowski* had any knowledge that Chimka and Palka were financially irresponsible and their creditors would be unable to reach any property belonging to them or to secure payment of the debts owing by either of them. The finding that the transfer of the property by Palka to *Kurowski* was in effect an assignment of Palka's contract of purchase from Chimka is wholly unsupported by the facts. The evidence shows without dispute that a sale of property between Palka and *Kurowski* was negotiated on an agreed consideration through Palka's agent, and the transaction constitutes a direct sale of the goods between the parties. The trial court awarded recovery to plaintiff as a creditor of Chimka against *Kurowski* upon the grounds that plaintiff had the right to satisfy his claims out of the goods, wares, and merchandise Chimka sold to Palka, who in turn sold them to *Kurowski*, because the sale by Chimka was in violation of the bulk sales law (sec. 2317*c*, Stats.), and that *Kurowski*, under the facts of the transaction, is estopped from claiming title to the goods as against Chimka's creditors. Concededly the requirements of this act were not complied with in making these sales of these goods, and the sale

to Palka was void as to Chimka's creditors. The court held *Kurowski* could not stand in the position of an innocent purchaser as against Chimka's creditors in the light of the facts of the case. It is contended by plaintiff that the bulk sales law by its terms makes absolutely void as to the seller's creditors a transfer of a stock of goods not made in compliance therewith, and that a transferee under such circumstances acquires no title, and hence he cannot convey a good title to the goods to a third party. This claim is based upon the terms of the act declaring that such a sale "shall be conclusively presumed to be fraudulent and void as against the then existing creditors of the seller. . . ." The original statute did not make a sale in bulk without notice to the seller's creditors required by the statute *conclusively* void, and under that statute it was held in *Fisher v. Herrmann,* 118 Wis. 424, 95 N. W. 392, that the fraud presumed could be repelled by the *bona fides* of the transaction. It is evident that the amendment makes such a sale for want of conformity to the statute *conclusively* fraudulent and void as to the seller's creditors. This effect, however, does not render a sale of the goods void between the first buyer and a third party and prevent a transfer of title to the property from the former to the latter. *Zahl v. Billings,* 118 Wis. 459, 95 N. W. 374. The first seller's creditors had the right, however, of satisfying their demands against the property sold in the possession and ownership of the first purchaser, either by attaching the property in the buyer's hands or by garnishment of the buyer for the value of the goods he purchased. *Gazett v. Iola C. M. Co.* 164 Wis. 406, 160 N. W. 170; *Jaques-Tinsley Co. v. Carstarphen W. Co.* 131 Ga. 1, 62 S. E. 82, and cases cited; *Leidersdorf v. Kress,* 169 Wis. 484, 173 N. W. 218.

Applying these rules to the instant case, the result is that the sale from Chimka to Palka was conclusively void as to Chimka's creditors, who had the right to enforce payment of their demands by attachment of the goods in Palka's possession or to proceed in garnishment against Palka to collect

from him the value of the goods received from Chimka. This the plaintiff as Chimka's creditor did not do, but he attached the goods in possession of *Kurowski,* who purchased them from Palka three or four days after Palka acquired them from Chimka for a valuable consideration. The terms of the statute do not declare that a sale of goods by the fraudulent vendee, within this statute, to an innocent purchaser for value shall be void as to the creditors of the first seller. The provision declaring that the fraudulent vendee of the original vendor "shall become, and be held, liable and accountable to the creditors of the seller . . . for all goods . . . coming into his possession or control by virtue of such sale, . . ." (sec. 2317*f*) indicates an intent that the rights and liabilities arising out of the fraudulent sale in favor of the first seller's creditors are confined to liability for the goods in the possession and control of the first buyer or that he be proceeded against for their value. This statute does not render an innocent purchaser of the goods for a valuable consideration from the first buyer liable to the creditors of the first seller nor affect his title to the property. So in this case it must be held that *Kurowski* is not liable on a claim of plaintiff against Chimka if it appears he was an innocent purchaser of the goods from Palka for a valuable consideration. There is no dispute but that the sale from Chimka to Palka was void under the bulk sales law for want of compliance with its terms. It also appears that the sale from Palka to *Kurowski* was made without any attempt to follow the requirements of the bulk sales law. The plaintiff, however, is not a creditor of Palka, but sues as a creditor of Chimka. The trial court did not expressly find that *Kurowski,* in buying the goods in question, had the intent to hinder, delay, or defraud the creditors of Chimka. The question arises, Is he in law an innocent purchaser of these goods for value under the facts and circumstances shown by the evidence? As above indicated, *Kurowski* had no knowledge that Chimka was indebted to plaintiff or any person at the time he sold

to Palka, aside from the schedule of creditors Palka represented to him he had agreed to pay for Chimka and which *Kurowski* in turn agreed to pay out of the purchase price of the goods under his purchase from Palka. The evidence adduced does not warrant the inference that either Palka or *Kurowski* knew that Chimka was indebted to plaintiff or any person other that those specified in the list attached to the bill of sale. Can bad faith in the law be predicated on the fact that this list of creditors was not verified by oath as prescribed in sec. 2317*c*, Stats., and the further fact that the parties to the transaction, though in fact ignorant of the existence of the bulk sales law, were informed that such steps as are required to make a valid transfer of this stock of goods as against the seller's creditors were not, in fact, taken? As stated in *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392: "The terms of the statute are in their nature strict and severe when applied to ordinary business transactions." We are not persuaded that the facts and circumstances of the sale to *Kurowski* characterize the transaction as fraudulent in the legal sense. It is apparent that *Kurowski* paid full value for the goods and that he did what an honest purchaser would be expected to do, namely, see to it that all the creditors of Chimka he had knowledge of were protected and paid. This, under the evidence, is all that could reasonably be demanded of him in the light of his knowledge and understanding of the facts surrounding the transaction involved in both sales. We are of the opinion that the record does not show that the sale to *Kurowski* was fraudulent as against the creditors of Chimka. The trial court seemingly awarded judgment in plaintiff's favor on the principle that defendant *Kurowski* was estopped from asserting title to the property in question under his alleged purchase from Palka. We find no justification for this conclusion on the facts of the case. It follows that plaintiff has established no case which entitled him to judgment against the defendant *Kurowski*.

By the Court.—The judgment appealed from by the defendant *Joseph Kurowski* is reversed, and the cause remanded with direction to award judgment dismissing plaintiff's complaint as against the defendant *Joseph Kurowski,* with costs.

SWENNES, Appellant, vs. CITIZENS STATE BANK OF RICE LAKE, Respondent.

October 10—November 4, 1919.

Banks and banking: Liability for release of mortgage by cashier.

Where plaintiff, knowing that the cashier of the defendant bank carried on a private loan business, purchased from him a thousand-dollar mortgage, receiving an assignment which he did not record and of which he and the cashier alone had knowledge, and afterwards the cashier, on receipt of $1,000 from the purchaser of the mortgaged premises, released the mortgage of record, paid the bank the amount of a second mortgage on the property, and deposited the balance to his private checking account, which he shortly thereafter overdrew, the bank was liable to the plaintiff for only the amount it received in satisfaction of its mortgage. ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Barron county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action to recover the sum of $956.36 damages because of the unauthorized release of plaintiff's mortgage by one Sewell A. Peterson, cashier of the defendant. The court found that Peterson, to the knowledge of plaintiff, carried on a private loan business from which he alone individually profited; that plaintiff bought a mortgage for $1,000 from him on property belonging to one Howard, executed to Peterson as mortgagee, and of which plaintiff had an unrecorded assignment, the existence of which was known to Peterson and plaintiff alone. Plaintiff had dealt with Peterson for some time past, and it was the usual custom between them to leave the assignments unrecorded and for

Peterson to make collections of principal and interest for plaintiff and to satisfy such mortgages in his own name when paid. Howard desired to sell a lot being a portion of the premises covered by the mortgage, and he and the purchaser went to the bank and saw Peterson about releasing the lot from the lien of the mortgages thereon. He said he would release them for $1,000, which was paid him by the purchaser of the lot. The bank had a second mortgage on the lot amounting to $458.48. Peterson paid this to the bank out of the $1,000 received and deposited the balance to his own personal account, which account was overdrawn long before any officer or employee of the bank other than Peterson had any knowledge that the released mortgage did not in fact belong to Peterson. The court entered judgment against the bank for the amount of $458.48 and interest, being the amount paid for its mortgage, from which judgment the plaintiff appealed.

For the appellant there was a brief by *J. C. Davis* of Hayward, attorney, and *Sturdevant & Farr* of Eau Claire, of counsel, and oral argument by *L. M. Sturdevant.*

For the respondent there was a brief by *Clarence C. Coe & Arthur E. Coe* of Barron, and oral argument by *Clarence C. Coe.*

VINJE, J. Plaintiff makes some attack on the findings of fact which we deem not well taken because there is practically no dispute in the evidence and it sustains the findings made. He further claims that notice to Peterson that he did not own the mortgage was notice to the bank of that fact and hence the money deposited by Peterson from the proceeds of the release was known by the bank not to belong to Peterson and it should not have allowed him to check it out for his individual use. That in doing so it became liable to plaintiff for the amount. This claim seems to be based upon the idea that in releasing plaintiff's mortgage Peterson was acting in behalf of the bank and was transacting the

bank's business. There is no evidence to sustain such claim and it is contrary to the court's findings. In making the release Peterson was transacting his individual loan business, and in making the deposit he stood in the same relation to the bank as any other depositor. The bank had a right to assume that the money realized from the release belonged to Peterson. Its second mortgage was not due and it was not asking for payment thereof, but when Peterson tendered payment it received it and surrendered its mortgage. And as to this transaction the circuit court held that Peterson was acting for the bank and entered judgment against the bank for the amount received by it. The case of *Mitchell St. State Bank v. Schaefer,* 169 Wis. 543, 173 N. W. 330, is relied upon as an authority showing the bank's liability. But in that case the bonds converted by the cashier belonged to the bank as collateral security. They were taken for its benefit, and of course the bank could not escape liability by showing that one of its officers had wrongfully converted them to his own use. Here the money deposited by Peterson, so far as the bank knew, belonged to Peterson; and the bank, as it had a right to do, treated it as such and permitted Peterson to check it out like any deposit made by any other depositor. The releasing of the two mortgages, though made at the same time and with Peterson alone, were in fact two separate transactions. As to the first mortgage Peterson acted as the agent of plaintiff alone, as he had a right to do according to their established custom. The bank had no interest in this transaction and could not be charged with notice of the fact that it was not Peterson's mortgage. As to the second mortgage Peterson acted as the agent of the bank, and the court held the bank liable for the money it received through this transaction. This certainly was as far as justice required it to go. The case comes well within the rule announced in *In re Plankinton Bank,* 87 Wis. 378, 58 N. W. 784, to the effect that a bank is not chargeable with knowledge of the ownership of moneys collected by one

of its officers in his private loan business and deposited by him in the bank to his private account, though it had notice that he conducted a loan business, collected money for others, deposited only in that bank, and kept no separate account. The money here in dispute was drawn out by Peterson long before the bank had any knowledge that plaintiff claimed it. The court therefore properly refused to enter judgment for plaintiff for any part of such deposit.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). The vendors and vendees of the real estate in question, desiring to clear the title of it from both the first and second mortgages, went to Peterson, an official of the bank, with reference to such entire purpose.

While acting as such official of the bank Peterson was bound to know, both in his individual capacity and in his official capacity, if the two must be considered separately, that a payment in full of the first mortgage could not be safely made by the persons dealing with him except and unless payment was made to the person having physical possession of the note and mortgage. *Bautz v. Adams,* 131 Wis. 152, 157, 111 N. W. 69; *City Bank v. Plank,* 141 Wis. 653, 659, 124 N. W. 1000.

The note and mortgage had been sent by Peterson to the plaintiff and were then held by him. Peterson, knowing these things and that the bank was not entitled to its second mortgage until and unless there was a release of the first mortgage, permits the funds of the bank to be used for the purpose of clearing the title and permitting the bank to get its money. The bank accepts the benefits of the transaction performed by its agent, receives its money in effect ahead of the first mortgage, and ought not to be permitted to separate that which was one indivisible transaction into two. The bank was chargeable with knowledge that Peterson was engaged in the real-estate business on his own behalf and so dealing while also an official of the bank. Having permitted

him so to act, it ought not to be heard to say that the knowledge he had in his mind at the time he acted for them could be separated into two parts, one good for them and the other bad for the plaintiff, realize on the one and repudiate the other.

There seems a substantial difference between the facts in the case at bar and that disclosed in the case cited in the majority opinion of *In re Plankinton Bank,* 87 Wis. 378, 58 N. W. 784, for in that case there was no intermingling of the private transactions of the officer with those done in his capacity as an officer of the bank. The bank there was not, as here, interested at all in the results of such transactions.

I think the case is ruled in favor of the plaintiff by the decision in *Mitchell St. State Bank v. Schaefer,* 169 Wis. 543, 173 N. W. 330. See, also, *Union Inv. Co. v. Epley,* 164 Wis. 438, 160 N. W. 175; *Tesene v. Iowa State Bank* (Iowa) 173 N. W. 918.

The plaintiff should have been allowed to recover the full amount claimed.

IN RE GRBIC.

November 4, 1919.

Ne exeat: Functions and grounds of writ: Divorce: Jurisdiction of courts statutory: When writ of ne exeat authorized in divorce action.

1. Since secs. 2784–2786, Stats., do not specify the grounds on which a writ of *ne exeat* may issue, the functions and grounds of the writ are governed by the common law.
2. Courts, either of law or equity, possess no powers in divorce actions except such as are conferred by statute, and authority for any act or proceeding must be found in the statute.
3. Sec. 2348, Stats., authorizing the circuit court in divorce actions to do all acts necessary and proper in such actions and to carry its orders and judgments into execution, empowers it to issue a writ of *ne exeat* to prevent its judgment for alimony, when rendered, from becoming ineffective.

WRIT of *habeas corpus*. August 27, 1919, Helen Grbic as plaintiff began an action for divorce against the petitioner as defendant. On the 8th day of September the defendant was ordered to pay the plaintiff $8 a week temporary alimony and $25 attorney's fees. On the 11th day of September, upon the verified complaint and affidavit of the plaintiff, a writ of *ne exeat* was issued, and on the 12th day of September the sheriff took the defendant into custody under the writ. On the 16th day of September the defendant served his verified answer, denying the allegations of the plaintiff's complaint, and by order of the court the plaintiff was required to show cause why the writ of *ne exeat* should not be vacated. On the 18th day of September the trial court denied defendant's motion to vacate the writ. In the affidavit upon which the writ was partly based it is alleged that before the order for alimony could be served the defendant withdrew from the banks all of the moneys on deposit belonging to the parties, $3,100, which sum represented their joint savings. It is further alleged that the defendant attempted to remove the money beyond the jurisdiction of the court, and that he told the plaintiff and other persons that he would go to Europe and take the money with him. The defendant remained in the custody of the sheriff, not having given bail.

The defendant, the petitioner, applied to this court for a writ of *habeas corpus*, and on the 7th day of October the sheriff made his return, setting forth the writ of *ne exeat*, from which it appears that the defendant was required to give bail in the sum of $1,500, with sufficient sureties. The respondent sheriff moved to quash the writ.

Arthur R. Barry and *Benj. T. Shiek* of Milwaukee, for the petitioner.

L. A. Zavitovsky, attorney, and *George A. Bowman*, of counsel, both of Milwaukee, for the respondent.

ROSENBERRY, J. The question raised by the motion to quash the writ is whether or not the circuit court for Mil-

waukee county had jurisdiction, upon the facts and circumstances shown by the affidavit and verified complaint of the plaintiff, to issue a writ of *ne exeat*. The statutory provisions relating to the writ of *ne exeat* are found in secs. 2784–2786. While sec. 2785, Stats., provides that no writ of *ne exeat* shall be granted unless it satisfactorily appears to the court or the judge by the affidavit of the plaintiff or some indifferent witness that sufficient grounds exist therefor, the grounds upon which the writ may issue are not specified. As said in *Davidor v. Rosenberg,* 130 Wis. 22, 109 N. W. 925, resort must be had to the common law to ascertain the function of the writ as well as the grounds upon which it may issue. The nature of the writ and the grounds upon which it may issue are discussed in *Davidor v. Rosenberg* and the cases there cited, no reference being made to actions for divorce.

"It is an undoubted general principle of the law of divorce in this country, that the courts, either of law or equity, possess no powers except such as are conferred by statute; and that, to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority therefor must be found in the statute, and cannot be looked for elsewhere, or otherwise asserted or exercised." *Barker v. Dayton,* 28 Wis. 367.

Sec. 2348, Stats., provides:

"The circuit court has jurisdiction of all actions to affirm or to annul a marriage, or for a divorce from the bond of matrimony, or from bed and board, and authority to do all acts and things necessary and proper in such actions and to carry its orders and judgments into execution as hereinafter prescribed. All such actions shall be commenced and conducted and the orders and judgments therein enforced according to the provisions of these statutes in respect to actions in courts of record, as far as applicable, except as provided in this chapter."

In *Damon v. Damon,* 28 Wis. 510, decided the same term as *Barker v. Dayton,* it was held that a third party might be

joined with the husband in an action for divorce, where the third party had accepted a conveyance of the husband's property in an attempt to defraud the wife. The court says:

"It is urged that the power of the court in these divorce cases is limited; that it cannot exercise full equity powers, but only such as are conferred by the statute; and, inasmuch as the statute does not expressly provide that third parties may be made defendants in divorce suits, that therefore no person can be made a defendant in those actions other than a party to the marriage contract. We do not so understand the statute. We think that when the court is empowered to award alimony to the wife out of the husband's estate; to adjudge to her property, or the value of it, that came to her husband by reason of their marriage; to sequester his personal estate, and the rents and profits of his real estate, to enforce compliance with its judgment; and to divide and distribute the whole estate between the parties,—that the power to bring before it as a party defendant in the same action any person who is attempting fraudulently to keep the estate over which the court has such absolute control, away from the jurisdiction of the court and out of the reach of its judgment, must necessarily follow." See *Griffin v. Griffin,* 47 N. Y. 134; *Perry v. Perry,* 2 Paige Ch. 501.

Under the power conferred upon the circuit court to enforce its judgments, as in other cases, it was held in *Barker v. Dayton, supra,* that the plaintiff could maintain a supplementary proceeding, it being a proceeding in the same action, although a substitute for a creditors' bill under the old practice.

While recognizing the difficulties, in that it was impossible to name a specific sum as being due, and the right to alimony being uncertain, Chancellor KENT allowed the writ in a divorce action where the defendant husband threatened to remove his property from the jurisdiction of the court. *Denton v. Denton,* 1 Johns. Ch. 364, second appeal, 441. See, also, *Yule v. Yule,* 10 N. J. Eq. 138; *Prather v. Prather,* 4 Desaus. Eq. (S. C.) 33, 118 Am. St. Rep. 993. We think

the authority is conferred upon the circuit court by sec. 2348 to do all acts and things necessary and proper in such actions, and issue such writs as may be issued in respect to other actions for the purpose of making its orders and judgments effective, and that the court had jurisdiction, therefore, to allow the writ in this case.

The reasoning of the court in *Damon v. Damon,* 28 Wis. 510, applies fully to the facts in this case. If it were held that the court had no jurisdiction to issue the writ under the facts in this case, its judgment when rendered, excepting so far as it affected the status of the parties, would be ineffective, and the plaintiff without remedy.

By the Court.—Motion to quash granted, and petitioner is remanded to the custody of the sheriff of Milwaukee county. Petitioner to pay the clerk's fees.

STATE EX REL. BLAINE, Attorney General, vs. ERICKSON.

November 7—November 17, 1919.

Taxation: Ministerial duty of town clerk to prepare tax roll: Reassessment rolls in place of original assessment rolls: Duty of town clerk after reassessment: Adjustment of inequalities involving private rights: Regularity and validity of assessment not to be questioned by town clerk: Mandamus to compel town clerk to use reassessment rolls: Original jurisdiction of supreme court.

1. The supreme court has original jurisdiction in *mandamus* to compel a town clerk, in making his tax roll, to use reassessment rolls as required by sec. 1087—57, Stats. 1917, notwithstanding the objection that a purely local question is involved, where the remedy in the lower courts appears from the petition and answer to be entirely lacking or to be inadequate and ineffective.
2. When the assessment roll has been completed and passed on by the board of review, the assessor must, under sec. 1064, deliver it to the town clerk, who shall examine it and make certain specified necessary corrections (sec. 1065), after which he must prepare the tax roll, which shall contain a list of all the taxable real property (sec. 1078), and calculate

the amount required to be raised on such valuation. Such acts being purely ministerial, the town clerk is without judicial discretion to determine that a reassessment is invalid; and defects therein cannot excuse or justify his refusal to comply with the law.

3. When reassessment rolls were filed with the town clerk they became by operation of law the rolls upon which the taxes apportioned to the town were to be calculated, and, under sec. 1087—57, if filed too late to take the place of the original rolls, they were to be taken into account in making the next succeeding tax roll.
4. The statutory direction to the town clerk to include corrections made on the basis of the reassessment in the levy and apportionment of the tax roll next following the completion of the reassessment is a continuing mandate to that officer, imposing upon him the duty of including corrections necessary to give effect to the reassessment until it has been actually carried out in the manner provided by law.
5. It is not the duty of a town clerk to anticipate any inequalities resulting from the corrections to be made on the basis of reassessment rolls for previous years and attempt to adjust them, but to levy the tax as the law requires, since matters relating to private rights are subject to other remedies.
6. It is the duty of the town clerk, under sec. 1087—57, to take reassessment rolls and from them prepare the tax roll in the manner pointed out by statute, making the necessary credits and debits to give effect to the reassessments for the preceding year; and he is in no position to question the regularity or pass upon the validity of the acts of those whose duty it was to prepare the reassessment rolls.

MANDAMUS to compel the town clerk of Oakland, Douglas county, to use reassessment rolls as required by sec. 1087—57, Stats., in making his tax roll.

The petition alleges that the defendant, *Carl Erickson,* is now and at the times stated herein was town clerk of the town of Oakland, formerly named South Range, in Douglas county; that the reassessment of certain property in said town for the year 1918 was made pursuant to statute and the order of the tax commission, and a reassessment roll of said town was made and completed and delivered to defendant as such town clerk on October 28, 1918, and on that date filed in his office; that the town clerk disregarded his

duty, ignoring such reassessment and reassessment roll, and made the tax roll for said year on the basis of the original assessment, and the taxes were collected in accordance therewith.

That a reassessment of the property in said town for the year 1917 was made pursuant to statute and the order of the tax commission; that such reassessment for the year 1917 was not completed in time to take the place of the original assessment in such districts for the year 1917, but was completed and delivered to the defendant as town clerk and filed in his office on the 28th day of October, 1918, in time to be used in the preparation of the tax roll for the year 1918; that said town clerk wholly ignored said reassessment and reassessment roll, and made out the tax roll for the year 1918 as though no reassessment had been made for the year 1917.

That a reassessment of the property of said town for the year 1916 was made pursuant to statute and the order of the tax commission, and a reassessment roll was made for the year 1916, but not completed in time to be used in making the tax roll for the year 1916, but was filed in the office of the town clerk on or about the 30th day of October, 1917, in time to be used by the town clerk in making and preparing the tax roll for the year 1917; that although it was the duty of the town clerk to use such reassessment roll in preparing the tax roll for the year 1917, he wholly neglected and refused to do so, and that the tax roll for 1917 was carried out as though no reassessment had been made for the year 1916.

That a reassessment of the property in said town for the year 1915 was made pursuant to statute and the order of the tax commission, and a reassessment roll thereof was made and completed and delivered to the town clerk on or about October 31, 1915, in time to take the place of the original assessment made in such district for the year 1915, and that such reassessment roll by operation of law took

the place of the original assessment; that the town clerk wholly ignored such reassessment and reassessment roll, and prepared and made the tax roll for the year 1915 and calculated and carried out the taxes thereon upon the basis of the original assessment.

That none of said reassessments have ever been used in the levying or collection of taxes or formed the basis of taxation or of the adjustment of inequalities of taxation; that the inequalities of taxation in said town during each of the years covered by said reassessments, respectively, are numerous and substantial, and are due to the unequal original assessments which formed the basis of the taxation imposed; that it is the duty of the town clerk to remedy and compensate in the tax roll of 1919 those inequalities in taxes that are shown and to that end to make use of said reassessments and compute and credit or debit, as the case may be, the several sums necessary to effect such remedy and compensation.

It is further alleged that the defendant persists in his disregard of said reassessments and in the violation of his duty relative thereto, and that such disregard and violation of duty will continue unless the defendant is coerced by this court; that the remedy afforded the plaintiff in the circuit court is inadequate; that it will be ineffective; that the town clerk is commanded by sec. 1081 of the Statutes to complete the tax roll for the year 1919 and deliver the same to the town treasurer on or before the 15th day of December; that said disregard of duty by the clerks of said town has long continued and has defeated the purpose and object of the levying of taxes in accordance with the reassessments; that efforts have been made to induce the town clerk to comply with the law, and make reassessments and carry out the tax levies in accordance with the laws of the state of Wisconsin, but all such efforts have failed; that the sovereignty of the state and the public interest is involved in this proceeding; that the refusal of the defendant and

others to recognize reassessments has had a very demoralizing effect upon the administration of the tax laws in that part of the state affected; and prays that a peremptory writ of *mandamus* be issued out of this court commanding that said *Carl Erickson,* as town clerk of the town of Oakland, recognize the validity of the several reassessments of the property of said town for the years 1915, 1916, 1917, and 1918; that in making up the tax roll for the year 1919, and apportioning the taxes for said year and spreading them upon the tax roll, he compensate the inequalities of the levies made under the original assessments for the years 1915, 1916, 1917, and 1918 in the manner prescribed by law.

The matters here set out briefly are set forth in the petition at length, with definiteness and particularity.

The defendant made return to the writ, and from the return and the supplemental return it appears:

1. The defendant objects to the exercise by this court of its original jurisdiction in this proceeding, on the ground that it is a local matter and that the remedy in the local court is adequate.

2. On the merits the defendant alleges that in August, 1915, the tax commission made an order directing a reassessment of the taxable property in the town of South Range; that such reassessment was made and that a pretended reassessment roll was filed in the office of the town clerk, but that said pretended reassessment roll was illegal and invalid; that, whether or not it was invalid, it is now too late under the law to attempt to make an adjustment for the year 1915; that the assessor of the town of South Range in 1915 made an assessment of the real and personal property in said town, which was duly sworn to, filed, and passed upon by the board of review of said town; that the reassessment was invalid for three reasons: (1) that a large amount of lands and improvements were assessed greatly above their actual market value, while a part of the lands

in said towns were assessed much below their market value, and that such assessment was discriminatory; (2) that no proper legal notice of the meeting of the board of review for the reassessment was given, and that the notices were not posted in public places; (3) that the notices were insufficient in that they did not refer to the reassessments, but were made in such a manner as not to call attention to the reassessments.

3. That defendant was not clerk of the town of South Range, or Oakland as it is now called, during the years 1915, 1916, or 1917; that defendant was first elected in the month of April, 1918, and was re-elected in April, 1919.

4. Defendant further alleges that on account of the invalidity of the reassessment roll the same was not used by the town clerk in making up the tax roll for the year 1915, and that as to some of the property described in such tax roll the taxes for the year 1915 had been paid and adjusted upon practically the same basis and for the same amounts as though the said reassessment had been made the basis for the taxes for that year upon said lands; that some adjustments were made as to some parcels of land in said town in a lump sum; that the reassessments in the aggregate cover as much as ten per cent. of the lands in said town; that a considerable amount of land in said township has changed owners since the year 1915.

5. The return further shows that the tax commission made an order directing a reassessment upon the property of said town for the year 1916; that said reassessment was not completed in time to be used in connection with the tax roll of 1916, but was completed and filed in the office of the town clerk on the 3d day of October, 1917; and alleges that the then town clerk, Leonard Pleski, did use the reassessment for 1916 in making up the tax roll for the year 1917, and delivered the tax roll with the usual warrant to the then treasurer of said town; that suits were begun to restrain the collection of the taxes which were increased by

virtue of said reassessment, and that upon a trial the reassessment and the reassessment roll were held invalid for the reason that the persons charged with the duty of making such reassessment wholly failed to verify the reassessment roll or to make affidavits to said reassessment; that after the determination of said suits the town treasurer would not allow the credits or permit the debits entered on said roll for the reason that said reassessments were illegal and ineffective; that the taxes were collected on the basis of the original assessment roll for the year 1917; and that entries thereon relating to the reassessment for the year 1916 were stricken out; that certain other actions were begun in the year 1918 to prevent the collection of the taxes for the year 1917 without allowing the credits which would have resulted had the reassessment of 1916 been used; and that adjustments were made in said actions.

6. The defendant further alleges upon information and belief that a considerable amount of land in said township has changed ownership since 1916, and that gross inequalities would result if he should be required to use said reassessment roll for the year 1916 in computing the taxes for the year 1919; that he has never been requested by any one to consider or make effective the reassessment roll for the year 1916 until the service of the alternative writ in this proceeding.

7. The defendant further alleges that no application was made to the tax commission of Wisconsin for a reassessment in said town for the year 1917 until January 23, 1918; that the order for reassessment was entered on April 23, 1918; that an action was then begun to test the validity of such order; that said action was finally determined in this court on December 3, 1918, confirming the jurisdiction of the tax commission to make the order in question; that meanwhile the defendant withheld from the possession of the tax commission and the persons appointed to make the reassessments the tax roll for the year 1917; that such with-

holding was not for the purpose of preventing a reassessment, but for the purpose of performing his duties as town clerk as the defendant then believed them to be; that the town of South Range comprises territory less than 108 square miles in extent; that it is sixty-six square miles in extent; that this defendant did not, in making up the tax roll for the year 1918, use the reassessment roll for the tax of 1917, for the reason that it was invalid because the assessment was unjust and unfair and inequitable, and improved property was assessed at its just market value while other lands, particularly wild lands, were assessed at less than their actual market value; that the persons charged with the duty of making such reassessment did not verify the reassessment roll in accordance with law; that no legal notice was given of the meeting of the board of review to review such reassessment roll; that the meeting of the board of review was held October 28, 1918; that the notice thereof was posted on Sunday, October 20, 1918; that because of the illegality and invalidity of the reassessment roll the defendant did not use the same in preparing the tax roll for 1918; that on October 7, 1918, the tax commission made an order directing the reassessment of the property in said town for the year 1918, appointing assessors; that said assessors completed the assessment before the 28th day of October, 1918, but did not, so far as practicable, value each parcel of real estate in said town from an actual view thereof; that the reassessment was inequitable and unjust, in that a large part of the taxable property in said town was assessed at its full market value while other property was assessed at substantially less than its market value; that proper affidavits were not annexed to the reassessment roll; that proper notice of the meeting of the board of review was not given; that the meeting was held on October 28, 1918, and that notice of the holding thereof was posted on Sunday, October 20, 1918; that by reason of the illegality and invalidity of said reassessment the defendant omitted from the tax

roll of 1918 the reassessments, credits, and charges which would have resulted had said reassessment roll been given effect; that settlements made in the actions growing out of the taxation of 1916 in some instances included the settlements for the taxation for the year 1918; and that the use of the reassessment roll will result in giving of more than just credit to some taxpayers; and that the lands affected by said settlements include ten per cent. of the assessed valuation in said town.

The defendant then alleges generally that all of said reassessments for the years 1915, 1916, 1917, and 1918 are invalid and that no effect should be given to them; that the levy and apportionment of taxes for the year 1919 is not the levy and apportionment of taxes in said town next following the completion of said assessments or any of them.

The matters herein set out briefly are set out with definiteness and great particularity in the return. To the supplemental return are annexed copies of the affidavits referred to in the original return, which we consider as part thereof. Other facts are stated in the opinion. To the return the relator demurs.

For the plaintiff there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the defendant there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *Claude Z. Luse.*

The following opinion was filed December 2, 1919:

ROSENBERRY, J. The defendant objects to this court taking jurisdiction of this action, for the reason that the questions involved are purely local and that the remedy in the lower courts is adequate. In the *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, the court carefully reviews the provisions of the constitution, the statutory law, and the decisions of this court relating to the exercise

of its original jurisdiction by this court, and we shall not attempt a restatement of the matters there considered and stated. From the facts set out in the petition and in the return it is apparent that a remedy in the lower courts is either entirely lacking or is inadequate and ineffective. For four years the officers of the town of Oakland have succeeded in bringing to naught the efforts of the tax commission to administer and enforce the laws of this state, and it does not appear that they will ever succeed in their efforts if relief be denied here. That the matter is *publici juris* is apparent. If the taxing power of the state can be set at naught by the continued refusal of a ministerial officer to perform his duty, and no effectual remedy can be invoked, the situation is certainly extremely serious. Therefore we are of the opinion that under the principles laid down in the *Income Tax Cases* this court should take jurisdiction of this matter.

There is much said in the brief of counsel for defendant in regard to the jurisdiction of the town clerk, as if the town clerk were a judicial officer and required at his peril to determine the regularity of all prior proceedings in tax matters and to act thereon upon his judgment. In the preparation of the tax roll the town clerk acts purely as a ministerial officer. When the assessor has completed the assessment roll and it has been passed upon by the board of review, it is the duty of the assessor to deliver it to the town clerk on or before the first Monday of August. Sec. 1064, Stats. The clerk upon receiving the roll shall examine it and make certain specified corrections as they appear necessary. Sec. 1065. The particulars in which the roll may be corrected by the town clerk do not refer to any of the matters set out in the return in this case. When the corrections have been made the clerk prepares the tax roll, which shall contain a complete list of all the taxable real property, arranged as stated (sec. 1078), and upon the receipt of the certificate of apportionment from the county clerk the town clerk is re-

quired to calculate the amount required to be raised upon such valuation to realize in his town the whole of the state, county, school, together with such town and other local taxes as are to be levied, uniformly upon all the taxable property in the town. Speaking of the duties of a town treasurer, which are analogous to those of the town clerk, it was said in *Stahl v. O'Malley,* 39 Wis. 328, that

"It would be an intolerable evil if ministerial officers could sit judicially on valid process in their hands for execution, and assume authority to correct mistakes which they assume to discover in them. The good order of society requires that they should have no discretion or responsibility, but should obey their process with absolute submission, secure in doing so. And whenever they substitute judicial discretion for ministerial obedience, they mistake their authority and forego their protection." The town treasurer "had no duty or discretion outside of his process. And this is a lesson which ministerial officers cannot learn too often or too well."

It appears from the return that the defendant has attempted to pass not only upon the face of the reassessment rolls submitted to him, but has gone back of the roll to the proceedings relating to reassessment, to determine whether or not the persons charged by law with the duty of making the reassessments have properly performed their duties, whether the notices posted were in legal form, whether or not they were posted in what he conceived to be public places, and generally to determine the regularity and validity of the proceedings which resulted in the making of the reassessment rolls. The affidavits attached to the reassessment rolls, copies of which are attached to the supplemental return, appear to be substantially in accord with the statutory requirements. Certainly any defects appearing therein constitute no excuse or justification for the repeated refusals of the town clerk to comply with the plain provisions of the law. When the reassessment rolls for the several years were filed in the office of the town clerk such reassess-

ment rolls by operation of law became *the* roll upon which the taxes apportioned to the town were to be calculated and carried out. They supplanted the original rolls prepared by the assessor. If filed too late to take the place of the original roll, they were to be taken into account in the making of the next succeeding tax roll. Sec. 1087—57, Stats.

It is urged by the defendant that inasmuch as the reassessment rolls were not used in the levy and apportionment of taxation in the tax roll next following the completion of the reassessment, they have no longer any force or validity. We think the statutory direction to the town clerk to include corrections made on the basis of the reassessment in the levy and apportionment of the tax roll next following the completion of the reassessment is a continuing mandate to that officer, and imposes upon him the duty of including such corrections as are necessary to give effect to the reassessment until it has been actually carried out in the manner provided by law.

It is urged that the tax roll of 1919 should not include corrections to be made on the basis of the reassessment rolls, particularly for the year 1916, for the reason that certain adjustments have been made and that certain inequalities will result therefrom. These are matters which relate to private rights, and we shall not attempt in this proceeding to determine such questions. If private rights are involved, questions relating thereto will arise when the owners of property are called upon to pay their taxes. It is not the duty of the clerk to anticipate them and attempt to adjust them. It is his duty to levy the tax as the law requires. If difficulties are presented in complying with the mandate in this case, they arise almost wholly by reason of the wilful refusal of the clerk of the town of Oakland to comply with the plain provisions of the statutes. It is the duty of the town clerk to carry out the mandate of the statute, and it will remain his duty to do so until that mandate shall have been performed and the reassessments given full legal effect.

We shall not attempt to pass upon the legality of the preliminary steps to these various reassessments. They are not before us in this proceeding. The matter that we are here concerned with is the matter of the duty of the town clerk to prepare the tax roll in the manner prescribed by law. He is in no position to question the regularity or to pass upon the validity of the acts of those whose duty it was to prepare the reassessment rolls. It is his duty to take the reassessments rolls, which are fair upon their face, and from them prepare the tax roll for the year 1919 in the manner plainly pointed out by the statute, making the necessary credits and debits in the tax roll for 1919 to give effect to the various reassessments. Sec. 1087—57, Stats.

The facts set up in the return constitute no legal excuse for the refusal of the defendant to perform his duty, and the prayer of the petition must be granted. A decent regard for the public interests involved requires that the defendant proceed promptly as a public servant to perform his duty as a public official.

By the Court.—The demurrer to the return is sustained. A peremptory writ of *mandamus* is ordered to issue as prayed. No costs are to be taxed, except that defendant shall pay the costs in this court.

STATE EX REL. ATWOOD VS. JOHNSON and others.

[Soldiers' Cash Bonus.]

November 8—November 17, 1919.

Soldiers' cash bonus: Powers of state and federal governments: Powers granted and reserved: Delegation of legislative power: Depriving secretary of state of constitutional duty: Military power of state: Concurrent jurisdiction of federal and state governments: Conflicting state and federal laws: Special legislation: Equal protection of laws: Courts: Wisdom of legislation not a question for courts: Practical construction of constitution: Statutes: Vote of people to make statute effective: Taxation: Public purpose: Soldiers' bonus act as amendment of income tax law: Uniformity: Progressive taxation: Classification and exemptions: Discrimination: Inequality of burden: Corporations and individuals: Surtax: Right of offset: Foreign corporations: Allocation of income tax: Secretary of state as auditor.

1. Money appropriated under the Soldiers' Bonus Law (ch. 667, Laws 1919) and awarded to persons who served in the armed forces of the United States, and who at the time of their induction into that service were residents of Wisconsin, is for a public purpose, the services benefiting the state as well as the nation; and the exercise of the taxing power of the state in raising money to be given as an appreciation of the patriotic services rendered is justified. The assertion of power for a long period of time by similar legislative enactments and continued custom amounting to practical construction of constitutional provisions, while perhaps not controlling, is entitled to great weight on the question of public purpose.
2. The federal government having only delegated powers, and powers not granted to it expressly or by necessary implication being reserved to the states respectively, or to the people, by art. X of the federal constitution, and the state of Wisconsin having reserved to itself a certain military policy not inconsistent with that granted to the federal government by the federal constitution, the United States and the state have a concurrent right to legislate in respect to a subject matter not exclusively granted to Congress. The power of Congress to raise and support armies and to provide a navy does not preclude the Wisconsin legislature from enacting the soldiers' bonus law, which does not burden, interfere, or conflict with any federal legislation.

3. The taxing scheme embodied in the act is constitutional:

(a) The three-mill tax, being a general tax on all property for a public purpose, is not open to the objection of inequality of burden, special legislation, or want of equal protection of the law.

(b) The surtax provision is in effect an amendment to the income tax law, and under the law relating to income taxation, if the classification be proper and the exemptions reasonable, it is valid, the uniformity clause of the constitution having no application to the income tax. Since the classification is in conformity to the law, as there is no discrimination within a class and the exemptions in each class apply to every member of the class, it is no objection that the exemptions in one class are different from those in another.

(c) The fact that the surtax was levied upon 1918 incomes only, and the real-estate tax upon the assessment of 1919 only, did not constitute such incomes or assessment a class. They were merely the resources of the next tax levy upon which the additional tax required by the act was laid.

(d) It is proper classification to put corporations in one class and individuals in another, as there is a substantial difference in the situation—a corporation being an artificial creature of the state endowed with advantages which an individual does not possess; and the fact that the surtax of the individual begins with the fourth thousand of taxable income, while that of the corporation begins with the first thousand, does not make the exemptions arbitrary or whimsical.

(e) The fact that the general law provides that income taxpayers are entitled as an offset to the extent of the personal property tax paid and that the soldiers' bonus act denies the offset against a surtax, does not make the present act discriminatory or a denial of due process. *Income Tax Cases,* 148 Wis. 456, followed.

(f) Sec. 7 of the act is in effect an amendment to the income tax law; and in determining the basis upon which the six per cent. deduction allowed to corporations is to be computed, the capital stock, surplus, and undivided profits must be allocated on the same basis as the allocation of the income tax is to be made; and as the provision thus construed treats all corporations alike, there is no discrimination in favor of or against foreign corporations.

(g) The right granted to county boards to elect to issue bonds does not delegate to the county the legislative power to levy the mill tax, the legislature having levied the tax and the provision relating to the issue of bonds being an administrative detail regarding payment.

4. The duties conferred upon the service recognition board by the act are purely ministerial, and, the legislature having laid down a rule of law respecting its duties and vesting it with the determination of the facts, it is not a delegation of the taxing power of the legislature.
5. Although the law gives the service recognition board charge and control of the general scheme of payments and authorizes that body to adopt rules for the distribution of the fund, the ascertainment and selection of the beneficiaries, and the determination of the amounts to which they are entitled, it does not violate sec. 2, art. VI, of the state constitution, as it is incumbent upon the secretary of state to audit and pass upon all matters of which under the constitution he is *ex officio* auditor.
6. The provision for submission to the people of the question whether the tax shall be levied does not render the act unconstitutional, it being within the power of the legislature to make the taking effect of the law dependent on a vote of the people.

THIS ACTION was originally brought in this court to test the constitutionality of ch. 667, Laws 1919, known as the Soldiers' Bonus Act, and, if found unconstitutional, to restrain the enforcement of the act.

The attorney general declined to commence the action, and upon application the court granted leave to the relator here to institute the action in the name and behalf of the state.

The defendants are charged with the administration and enforcement of the act.

The complaint is as follows:

"Now comes the plaintiff in the above entitled cause, pursuant to leave of said honorable court, and for a complaint against the above-named defendants respectfully shows to the court:

"I.

"At its last session the legislature of the state adopted an act which is numbered and known as chapter 667, Laws of 1919. The act was approved on July 30, 1919, and at a special election held on September 2, 1919, a majority of the electors of the state voted in the affirmative upon the question embraced in section 9 of the act.

"Pursuant to section 1 of the act, the governor of the state has appointed *W. F. Lorenz* as one of the members of the service recognition board, which board has been organized pursuant to the act, and consists of *Emanuel L. Philipp*, governor, *Orlando Holway*, adjutant general, and *W. F. Lorenz*.

"Substantial doubt and controversy has arisen as to the validity of said act and as to the right of the service recognition board, the tax commission of Wisconsin (now *Nils P. Haugen, Thomas E. Lyons*, and *Carroll Atwood*), the secretary of state (now *Merlin Hull*), and the state treasurer (now *Henry Johnson*) to estimate, determine, assess, or collect the taxes provided for by the act, to certify or audit for payment or make any payments thereunder, or otherwise to proceed with the administration or execution of the act.

"II.

"Plaintiff is advised and believes that the act is subject to the following, among other, infirmities affecting its constitutionality, and that by reason thereof it is not a valid law:

"1. The act provides for the assessment and collection of taxes, and the expenditure of the funds thereby collected for other than the estimated expenses of the state, and for purposes which are not public, thereby violating the provisions of sections 2 and 5 of article VIII of the Wisconsin constitution and of the Fourteenth amendment to the federal constitution, and transcending the limitation, inherent in constitutional taxation, that taxes may only be levied and collected for public purposes.

"2. The act violates the provision of section 3 of article VIII of the constitution, which inhibits the giving or loaning of the credit of the state in aid of any individual.

"3. The act provides for extraordinary expenditures, not within the purview of the expenses which the legislature is, by section 5 of article VIII of the constitution, authorized to provide for by current taxation.

"4. The act provides for the payment, from moneys raised by taxation, of what is designated by the legislature as a 'bonus' to Wisconsin soldiers, sailors, marines, and nurses who served in the armed forces of the United States. Such

forces were the forces of the United States and not of the state. The Congress of the United States, pursuant to the exclusive power vested in it by section 8 of article I of the federal constitution, has by numerous laws made provision for compensating its armed forces during their service, for allotments to their families, for additional compensation to them or their dependents in case of disability or death, for vocational training of those disabled, for insurance in case of disability or death, and for the payment of a bonus upon discharge from service. The granting of benefits such as those provided for in said act is a matter of federal power exclusively, and the exercise of such power by the Congress has excluded its exercise by the state, even though the purpose were otherwise public.

"5. The benefits provided for by the act are declared to be given as a token of appreciation of the character and spirit of the patriotic service of soldiers, sailors, marines, and nurses who served in the armed forces of the United States during the war with Germany and Austria; the amount of benefits is largely governed by time of service; they are payable only to those of the classes named who were residents of Wisconsin at the time of induction into service; benefits are payable irrespective of manner of induction or character of service or discharge. Such classification and limitation of beneficiaries is not germane to the consideration of appreciation or gratitude which is the expressed purpose and object of the act. The act, therefore, denies the equality before the law which is guaranteed by sections 1, 9, and 22 of article I of the constitution of the state and by section 2 of article IV and the Fourteenth amendment of the constitution of the United States.

"6. The act provides for the assessment and collection of a surtax upon incomes, and for the assessment and collection by property taxation of a special tax, not exceeding three mills, and it is left to the estimate and determination of the service recognition board as to the amount, within prescribed limits, to be paid to the beneficiaries, and as to the amount, within the limit of three mills, to be raised by property taxation,—thereby unlawfully delegating legislative powers and violating the provisions of sections 2 and 5 of article VIII of the constitution of the state.

"7. The act provides for the levy and collection of a prop-

erty tax (the rate not to exceed three mills), only if and in so far as the prescribed surtax upon incomes may be insufficient to meet the expenditures provided for by the act. The exemptions from income taxes to be collected for the special and extraordinary purposes of the act are different from the exemptions allowed by law in the assessment of income taxes for other and general purposes. The surtax is laid upon a particular class of taxpayers. The act thus constitutes special legislation for the levy and collection of taxes, makes the burden of taxation, and the amount of exemption therefrom, dependent on the purpose to which the moneys raised are to be applied, and, for the special purposes of the act, discriminates against particular classes of taxpayers. This violates section 31 of article IV of the state constitution, prohibiting special legislation for the assessment or collection of taxes, the rule of uniformity prescribed by section 1 of article VIII of the state constitution, and the equality and justice guaranteed by sections 1, 9, and 22 of article I of the state constitution, and by the Fourteenth amendment of the federal constitution, and is violative of the inherent principles of constitutional taxation and government.

"8. The property taxes provided for by the act are to be levied for the current year; the surtax is retroactively laid upon incomes for the year 1918; in arriving at the surtax a large deduction is allowed to corporations and their stockholders which is not allowed to partnerships or other individuals,—thereby violating the rule of uniformity prescribed by section 1 of article VIII of the constitution of the state, and denying the equality before the law guaranteed by sections 1, 9, and 22 of article I of the state constitution, and by the Fourteenth amendment to the constitution of the United States.

"9. The provisions of sections 3 and 4 of the act are in violation of section 2 of article VI of the constitution of the state, providing that the secretary of state shall be *ex officio* auditor, and invest in such board discretionary powers which the legislature is without power to delegate.

"10. The act makes the levy of taxes to meet the expenditures provided for dependent upon a majority vote of the electors, thereby unlawfully delegating a power which resides exclusively in the legislature, and contravening the

provisions of sections 2 and 5 of article VIII of the constitution of the state.

"III.

"Many of the soldiers and sailors who served with the armed forces of the United States during the war with Germany and Austria have not yet been discharged, but are still serving as a part of the army and navy of the United States, and are receiving the compensation and benefits provided by acts of Congress and are subject to the control and discipline provided by federal laws and regulations.

"As plaintiff is informed and believes, many of the states of the Union have not adopted laws giving a bonus, gratuity, or other aid to residents of the state who served with the armed forces of the United States during said war.

"The government of the United States is now actively seeking to recruit, by voluntary enlistment, the navy and marine corps and measures are in contemplation looking to an increase in like manner of the army of the United States, and that such voluntary enlistments are being sought in the states which have not adopted laws giving a bonus, gratuity, or other aid to their residents who served in said war, as well as in this state.

"As plaintiff is informed and believes, various measures have been introduced and are pending in Congress having for their object the granting of benefits (additional to those already provided by Congress) to those who served in the armed forces of the United States during said war. Among them is a bill providing for a bonus similar to that provided for by said chapter 667.

"Among the residents of Wisconsin who served in the armed forces of the United States during said war there exist, as is judicially known to the court, differences as regards methods of induction into and discharge from service, time, place, and character of service, effect of service upon health, strength, and ability to earn, financial needs, and as regards other circumstances and conditions; there also exist differences between the character and extent of the service of the military units which composed the armed forces of the United States, which units were not generally made up of the residents of any particular state to the exclusion of the residents of other states, and some of which units, composed wholly or in part of residents of other states, had the

opportunity to perform and did perform military service conspicuous for its valor and its effect in accelerating the armistice. Some or all of the above and other facts which the court may judicially notice will be referred to upon the hearing hereof.

"IV.

"The officials constituting the defendants herein are proceeding to the administration and execution of said act as though it were a valid law. Unless restrained by the court, vast sums of money, probably aggregating upwards of $15,000,000, will be collected by taxation and expended in the administration and execution of the provisions of the act. The making of estimates as to the amount to be raised by income taxation and the amount to be levied by direct taxation is already in process, and the validity or invalidity of the act vitally affects the levy and collection of taxes for the current year throughout the state. Should taxes be levied or expenditures be made under the provisions of the act, and should the act remain in operation for several months, during which taxes were collected and their proceeds disbursed, and then be attacked and held unconstitutional, there would be involved questions as to the duties of state officials with respect to the recovery back of funds expended under the law, of the liability of the state treasurer for the making of such expenditures, of the obligation of accounting and reimbursement by the state for taxes unlawfully levied and collected, and infinite confusion would result. Upon request duly made to the attorney general of the state he refused, and still refuses, to commence or maintain, upon his own motion, any action to test the validity of said act.

"V.

"Relator is a citizen of Wisconsin and a resident of and taxpayer in the city of Janesville, in said state.

"Wherefore plaintiff respectfully prays the judgment of this court:

"(1) That the validity of chapter 667, Laws of 1919, be determined and the rights and duties of those charged with its administration be declared;

"(2) That in case chapter 667, Laws of 1919, be held invalid, its enforcement be restrained; and

"(3) That such other and further relief be granted as may be proper."

Harry L. Butler of Madison appeared as attorney for plaintiff.

The defendants, who appeared by *John J. Blaine,* attorney general of the state of Wisconsin, and *M. B. Olbrich,* deputy attorney general, demurred to the complaint for want of facts sufficient to constitute a cause of action. The issues before this court are raised by the demurrer to the complaint.

Messrs. *Crownhart & Wylie* of Madison appeared for a large number of soldiers, beneficiaries under the act, demurred to the complaint, filed a brief, and made an oral argument.

Roy P. Wilcox of Eau Claire appeared as *amicus curiæ* at the request of Wm. C. Johnson Post and Everett Hale Post of the American Legion.

The following opinion was filed December 24, 1919:

KERWIN, J. The many difficult and doubtful questions arising upon the validity of the act under consideration in this case, as well as the proper construction and administration of it, if the law be declared valid, rendered it highly important and eminently proper that the present suit be brought for the purpose of finally settling the questions involved.

The able and exhaustive presentation of the case in this court on both sides makes clear the importance of final determination of the issues tendered by the complaint and demurrer.

The defendants charged with the administration of the law are entitled to have the question of its validity settled and, if valid, be advised respecting their rights and duties under it. The act provides:

"Section 1. Section (1) of chapter 452 of the Laws of 1919, is amended to read: (Chapter 452, Laws of 1919)

Section 1. The service recognition board is hereby created to consist of the governor, the adjutant general and a returned soldier to be appointed by the governor.

"Section 2. For the purpose of raising a sum sufficient to assure each soldier, sailor, marine, and nurse, including Red Cross nurses, who served in the armed forces of the United States during the war against Germany and Austria, and who at the time of his or her induction into the service was a resident of Wisconsin, a sum not exceeding ten dollars for each month of service, with a minimum of fifty dollars, as a token of appreciation of the character and spirit of their patriotic service, and to perpetuate such appreciation as a part of the history of Wisconsin, a tax of not exceeding three mills on each dollar of the assessed valuation in addition to the income surtax hereinafter mentioned is hereby levied and authorized to be included in the next tax levy; provided that in case any county shall elect by resolution of the county board of such county, adopted prior to the levy of such tax, to raise said amount by a bond issue, authority is hereby conferred upon said county to issue such bonds and thereupon the proper authorities shall remit said levy in such county. If any person entitled to the benefits under this act be deceased before receiving such payment, then the payment accruing to said deceased shall be paid to the surviving widow, child or children, mother or dependent father, in the order herein stated, and in such case July 1, 1919, shall be deemed the date of termination of such service. The benefit of this act shall not accrue to any person for the time spent while taking training in any student army training camp, nor to any person who, although inducted into service, did civilian work at civilian pay.

"Section 3. All sums levied and collected by taxation or raised by the issue of bonds by any county shall be paid into the state treasury and held there as a special fund to be known as the service recognition fund and disbursed upon certificates of the service recognition board, as to the persons entitled thereto and the amount to which each person is entitled.

"Section 4. The service recognition board shall have complete charge and control of the general scheme of such payments. It shall adopt general rules, uniform throughout the state, for the distribution of said fund, the ascertain-

ment and selection of proper beneficiaries and the amounts to which beneficiaries are entitled, and for procedure, and may select or create such agents as it may deem necessary.

"Section 5. Subsection (5) of section 658 of the statutes is renumbered to be subsection (6) thereof.

"Section 6. There is added to section 658 of the statutes a new subsection to read: (Section 658) (5) For the purpose of carrying out the provisions of chapter 452 of the Laws of 1919; but bonds issued in any county for such purpose shall not exceed in amount three mills on each dollar of the total assessed valuation of such county."

Sub. (1) of sec. 7 provides for a surtax, in addition to the normal tax imposed by sec. 1087*m*—6, Stats., to be laid upon the taxable incomes of individuals, except as otherwise provided by law, in excess of $3,000, the surtax rate starting with one and three-fourths per cent. on the fourth $1,000 and progressively increasing until it reaches six per cent. on $12,000 or more of taxable incomes.

Sub. (2) of sec. 7 provides for a surtax, in addition to the normal tax imposed by sec. 1087*m*—6, Stats., upon the incomes of corporations, joint-stock companies, or associations, except as otherwise provided by law, beginning with two per cent. on the first $1,000 and progressively increasing until it reaches six per cent. of taxable incomes in excess of $7,000.

Sec. 7 further provides:

"(3) In computing the tax upon the income of corporations, joint-stock companies or associations, there shall be deducted, before such tax is computed, from the net income an amount equal to six per cent. of its capital stock, surplus and undivided profits.

"(4) The surtax provided for herein shall be upon the income received during the year ending December 31, 1918, and shall be returned, assessed and collected in the same manner and at the same time as is provided for the return, assessment and payment of the normal income tax provided for under sections 1087*m*—1 to 1087*m*—30, both inclusive, except as otherwise herein provided.

"(5) Deductions and exemptions as are provided by law

in the assessment of the normal income tax under section 1087*m*—6 shall be the same with respect to the assessment of this surtax, but said deductions and exemptions shall not be additional thereto and shall only be made once.

"(6) In the collection of said surtax the tax collector shall give his separate receipt therefor and there shall be no offset upon the personal property tax, and section 1087*m*—26 shall not apply to said surtax.

"(7) The whole amount collected as surtax shall, through the same channels as other income taxes are paid, be paid into the state treasury, and section 1087*m*—23 of the statutes shall not apply to said surtax. The amounts so paid into the state treasury shall be set apart for the service recognition fund.

"(8) The service recognition board shall estimate or cause to be estimated the amount which may be collected under this section and determine as nearly as practicable the balance needed for said fund, which balance shall be raised by taxation or bond issues as provided by section 2 of this act.

"Section 8. There is appropriated from the service recognition fund in the state treasury to the service recognition board:

"(1) Such sums as may be necessary to pay each soldier, sailor, marine and nurse, including Red Cross nurses, who served in the armed forces of the United States during the war against Germany and Austria, and who at the time of his or her induction into the service was a resident of Wisconsin, a sum not exceeding ten dollars for each month of service, with a minimum of fifty dollars.

"(2) Such sums as may be necessary to cover the cost of administering this act."

Secs. 9, 10, and 11, provide for a special election.

The important questions raised by counsel for the relator are: (1) Is the purpose of the act public within the meaning of the constitution? (2) Does the power of Congress under the federal constitution to raise and support armies and to provide and maintain a navy exclude state legislation such as here involved? (3) Is the taxing scheme embodied in the act constitutional? (4) Does the act unlawfully dele-

gate the taxing power of the legislature? (5) Does the law in question violate sec. 2, art. VI, of the Wisconsin constitution, providing that the secretary of state shall be *ex officio* auditor?

I.

The learned counsel for the relator contends that the money appropriated under the act in question is not for a public purpose and does not subserve the common interest and well-being of the people of the state; that where there is no public purpose in the sense of carrying on some part of the machinery of government, there is no power to tax; that where the public benefit which may come from an exercise of the taxing power is merely incidental or remote, the power is lacking; that there can be no legitimate taxation unless for the uses of the government levying the tax.

These propositions are ably argued by counsel for relator and it is true that they are among the important questions involved under this head. It may be conceded that the purpose of the law must in some sense be a public purpose in order to justify the exercise of the taxing power. Under the act the money appropriated is awarded "as a token of appreciation of the character and spirit of their patriotic service, and to perpetuate such appreciation as a part of the history of Wisconsin."

It is insisted that the services performed were performed for the United States, not for the state of Wisconsin; that the beneficiaries did not enter nor remain in the service at the instance of the state, but of the United States; and that there is no reciprocal benefit such as lies at the foundation of constitutional taxation.

However, the benefit which flows to the United States from the services performed is also a benefit to the state. The United States is composed of the family of states which in the aggregate constitute the United States. The common defense by the nation can only be successfully maintained by co-operation of the states, hence when a war is

waged by the nation those supporting it are performing services as well for their respective states as for the nation. *Brodhead v. Milwaukee,* 19 Wis. 624. In the above case at page 652 it is said:

"I think the consideration of gratitude alone to the soldier for his services, be he volunteer, substituted or drafted man, will sustain a tax for bounty money to be paid to him or his family. Certainly no stronger consideration of gratitude can possibly exist than that which arises from the hardships, privations, and dangers which attend the citizen in the military service of his country; and all nations have ever so regarded it. Who will say that the legislature may not, in consideration of such services, either directly or indirectly, or through the agency of the municipality or district to which he is credited, give to the soldier or his family a suitable bounty after his enlistment, or even after his term of service has expired? I certainly cannot."

Even in the dissenting opinion in the above case this doctrine was recognized. At page 665 Justice DOWNER, dissenting, says:

"Is the raising of money to pay bounties to volunteers who shall enlist in the service of the United States a public purpose? The whole United States had an interest in putting down the Rebellion. To put it down was a public benefit—a benefit to the Union—a benefit to each state—a benefit to every town, city, and village. Here then is a public interest or benefit, in the largest sense of the term. It is sufficient to authorize a state to tax its citizens, or the United States to tax all their citizens."

This court has recognized the doctrine of the *Brodhead Case* in several subsequent cases, among others *Curtis v. Whipple,* 24 Wis. 350, 355; *State ex rel. McCurdy v. Tappan,* 29 Wis. 664, 672; *Lafebre v. Board of Education,* 81 Wis. 660, 667, 51 N. W. 952; *Lund v. Chippewa Co.* 93 Wis. 640, 650, 67 N. W. 297; *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 142, 94 N. W. 50.

While there is language in some of the decisions of this court since the *Brodhead Case* was decided which in the

abstract might seem out of harmony with the rule of that case, we feel warranted in saying that the doctrine enunciated there has never been overruled by this court. The *Brodhead Case* has been followed in other jurisdictions. The following are a few of the many cases on the subject: *Cass Tp. v. Dillon,* 16 Ohio St. 38; *Speer v. Blairsville,* 50 Pa. St. 150; *Coffman v. Keightley,* 24 Ind. 509; *Veazie v. China,* 50 Me. 518; *State v. Holm,* 139 Minn. 267, 166 N. W. 181; *People ex rel. Doscher v. Sisson,* 182 App. Div. 734, 167 N. Y. Supp. 801; *State v. McClure* (Del.) 105 Atl. 712; *State ex rel. Campbell v. Stewart,* 54 Mont. 504, 171 Pac. 755; *State ex rel. Morris v. Handlin,* 38 S. Dak. 550, 162 N. W. 379; *Leavenworth Co. v. Miller,* 7 Kan. 479; *Opinion of Justices,* 175 Mass. 599, 57 N. E. 675; *Opinion of Justices,* 190 Mass. 611, 77 N. E. 820; *U. S. v. Gettysburg E. R. Co.* 160 U. S. 668, 16 Sup. Ct. 427; Judson, Taxation (2d ed.) § 386.

In Judson on Taxation, *supra,* at page 407 it is said:

"Whatever legitimately tends to inspire patriotic sentiments, and to enhance the respect of citizens for the institutions of their country, and incites them to contribute to its defense in time of war, has been held to be a lawful public purpose, such as will justify the exercise either of the power of taxation or of the power of eminent domain."

The doctrine is well stated in *State ex rel. Morris v. Handlin,* 38 S. Dak. 550, 162 N. W. 379:

"Looking at the substance and general spirit of the situation, we are of the view that any assault upon the government of the United States by insurrection or invasion is also an assault against each and every state government in the Union, and that it is equally the duty of the state to assist in repelling such assaults."

"The services performed while under the draft were public and rendered, in part, for the benefit of this state as one of the states of the nation. It would seem from a reading of the state and federal constitutions that the interests and duties, on the part of the state and nation in relation to

the common defense in resisting threatened invasion or insurrection, are so inseparably wound and woven together that it would make but little difference, if any, whether the members of the military organization which were to receive the benefit of the appropriation was state or national."

And in *Opinion of Justices,* 190 Mass. 611, *supra,* it is said:

"The doubt which arises as to the rights of the states of this country in this respect grows out of our dual system of government. The federal government alone has power to declare war, and our soldiers in the Civil War were in the military service of the United States. So far as we have been informed, since the adoption of the federal constitution none of the states has assumed to grant pensions to soldiers for service in the armies of the United States. For such purposes it is generally understood that our government is the federal government; but for many purposes, and in a certain field, Massachusetts is a sovereign state, maintaining an independent government. In another relation it is a member of the family of states, and a constituent force in the national organization. We are inclined to the opinion that, in this relation, it is so identified with the nation that it may treat the service of its citizens who serve to its credit in the armies of the United States as entitled to recognition from Massachusetts as a sovereign state. Each of us is a citizen of Massachusetts as well as a citizen of the United States. Massachusetts may honor her citizens for what they do for the national government, in those fields to which she sends them as her representatives under the constitution and laws of the United States."

The gratitude due the soldier is no idle sentiment. He who leaves his home and kindred, enters upon the trials and hardships of a soldier, risks his life upon the battle-field for the good of his country, is certainly entitled to the gratitude of all citizens.

There is another question which is important in considering the public purpose of the law. The assertion of power for a long period of time on the part of the state in adopting legislation similar to that here involved, while perhaps not

controlling, is entitled to great weight on the question of public purpose. The state of Wisconsin from early times has passed statutes awarding money by taxation for purposes not more public than the purpose involved in the act under consideration. A long line of legislative enactments of the state of Wisconsin as well as similar legislative enactments in other states are collected in the briefs of counsel for the defendants, which show that not only the state of Wisconsin but other states have regarded such or similar purposes as that here involved public. Such affirmance on the part of the legislatures and continued custom amounting to practical construction of constitutional provisions has great weight on the question of validity of the legislation as appears from decisions not only of this state but of the United States supreme court. *State ex rel. Hudd v. Timme,* 54 Wis. 318, 11 N. W. 785; *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627; *Loan Asso. v. Topeka,* 20 Wall. 655. In the latter case the court said:

"They must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

We have, in the instant case, not only this assertion of power on the part of the legislature and long continued custom, but we also have the overwhelming vote of the people at a special election held for the purpose of ratifying the levy of the tax. A review of the numerous statutes referred to in the briefs will show how liberal our legislature has been in making provisions in aid of soldiers of the Civil War.

We feel warranted in holding upon principle and author-

ity that the purpose of the act is a public purpose within the meaning of the constitution.

II.

It is further insisted by counsel for relator that the power of Congress under the federal constitution to raise and support armies and to provide and maintain a navy excludes state legislation such as is involved in the instant case.

This contention is based upon sec. 8, art. I, of the constitution of the United States, which provides:

"The Congress shall have power:
[11] "To declare war, . . .
[12] "To raise and support armies, . . .
[13] "To provide and maintain a navy;
[14] "To make rules for the government and regulation of the land and naval forces;
[15] "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;
[16] "To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
[18] "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Sec. 10, art. I, of the United States constitution provides that:

[3] "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Art. VI of the constitution of the United States provides:

[2] "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The following cases are cited in support of relator's position under this head: 12 Corp. Jur. 744; *Sturges v. Crowninshield,* 4 Wheat. 122, 193; *Tarble's Case,* 13 Wall. 397, 20 L. Ed. 597, 600; *Chinese Exclusion Case,* 130 U. S. 581, 604, 605, 9 Sup. Ct. 623; *Selective Draft Law Cases,* 245 U. S. 366, 381, 38 Sup. Ct. 159; *Ferguson v. Landram,* 1 Bush (Ky.) 548, 562; *People ex rel. Barlow v. Curtis,* 50 N. Y. 321, 326–328; *Konkel v. State,* 168 Wis. 335, 339, 340, 170 N. W. 715.

In considering the arguments of counsel and cases, it may be well to refer to some general provisions involving the relative powers of the state and federal governments. It must be borne in mind that the federal government under the constitution has only delegated powers, and powers not delegated to it or prohibited to the states are reserved to the states or to the people of the several states. It follows, therefore, that powers not expressly or by necessary implication granted by the constitution to the federal government nor prohibited by it to the states are reserved to the states respectively or to the people. Amendm. X, Const. U. S.

The objection raised by counsel under this head was urged in *Brodhead v. Milwaukee,* 19 Wis. 624, and disposed of as follows:

"Still another objection is, that the whole power of levying troops, organizing armies, fixing compensation, paying bounties, etc., resides in Congress, and that the states can take no action in the matter. This objection was urged and fully met in the Pennsylvania decision. If Congress has

the power and may legislate to the entire exclusion of the states, which is very doubtful so far as state aid to the persons and families of volunteers or drafted men is concerned, still Congress has not done so."

It is clear that Wisconsin has reserved to itself a certain military policy not inconsistent with that granted to the federal government under the United States constitution. Under the Wisconsin constitution the legislature "shall determine what persons shall constitute the militia of the state, and may provide for organizing and disciplining the same in such manner as shall be prescribed by law" (art. IV, sec. 29). "The governor shall be commander-in-chief of the military and naval forces of the states" (art. V, sec. 4). "The legislature may also borrow money to repel invasion, suppress insurrection, or defend the state in time of war . . ." (art. VIII, sec. 7). "The military shall be in strict subordination to the civil power" (art. I, sec. 20).

Amendm. II of the federal constitution provides: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

It is clear, therefore, under the federal constitution as well as under our state constitution that certain military policy is reserved to the state. See Wis. Stats. 1917, secs. 21.01 to 21.68 and 22.01 to 22.08, and 39 U. S. Stats. at Large, 197, ch. 134, sec. 57 *et seq.*, U. S. Comp. Stats. Ann. § 3041 *et seq.*

The case of *New York v. Miln,* 11 Pet. 102, involved the power given to Congress under the federal constitution to regulate commerce. Under a statute of the state of New York imposing penalties for failure by the master or commander of a ship to make report, it was held that the statute was valid, and that the power of Congress under the commerce clause of the constitution was not exclusive. At page 139 the court said:

"That a state has the same undeniable and unlimited

jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated."

It may be conceded for the purposes of this case that the power to raise and support an army and a navy rests with Congress, and that the states are precluded from adopting laws which may obstruct or embarrass such exercise of power. But the soldiers' bonus law under consideration does not interfere with the exercise of the power to raise and support an army. Justice Cooley in his work on Taxation, page 217, lays down the rule as follows:

"The general government having authority to declare war and conduct warlike operations, no question can exist of its right to levy taxes in order to pay bounties for military services performed or promised. The several states may with as little question do the same."

In matters of concurrent jurisdiction between the federal government and the states, the state has the right to legislate where such legislation is not in conflict with the act of Congress. *Bosworth v. Harp,* 154 Ky. 559, 157 S. W. 1084; *State v. Holm,* 139 Minn. 267, 166 N. W. 181.

This rule is recognized and asserted in *Konkel v. State,* 168 Wis. 335, 170 N. W. 715. At page 341 it is said:

"The United States and the states have a concurrent right in respect to the subject matter under consideration. The question then arises whether or not there is a conflict between ch. 409 [Laws 1917] and the soldiers' and sailors' civil relief act, for, if there be a conflict, the act of Congress, by par. 2, art. VI, of the federal constitution, is made the supreme law of the land."

Now it is clear from the decisions of this court, including the *Brodhead Case, supra,* as well as numerous decisions in other courts, that there is no conflict between the legislation here under consideration and the constitution of the United States and laws passed in pursuance thereof. It is true, as stated in *Sturges v. Crowninshield,* 4 Wheat. 122, relied upon by counsel for relator, that "Whenever the terms in which a power is granted to Congress, or the nature of the power, requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act upon it."

The above rule, when applied to the particular facts of the case, is a correct statement of the law and is as strong authority in favor of relator's position as any cited by counsel. The point involved in the *Crowninshield Case* is briefly stated in the syllabus at page 122 as follows:

"Since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, article I, section 10, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law."

In *Konkel v. State,* 168 Wis. 335 (170 N. W. 715), at page 340 this court said:

"In certain cases it is held, where the United States and the state have concurrent powers, that the exercise of the power of the United States is exclusive and the enactment of the state must stand aside. *Sturges v. Crowninshield, supra.* In certain other cases it is held that the enactments of both the United States and the state may stand together if there is in fact no conflict. *Asbell v. Kansas,* 209 U. S. 251, 28 Sup. Ct. 485; *Savage v. Jones,* 225 U. S. 501, 32 Sup. Ct. 715. In a particular case classification is often difficult, and the decisions of the federal as well as of the state courts are not always consistent."

Counsel for the relator have brought to the attention of

the court numerous acts of Congress respecting federal military regulations. We do not feel warranted in discussing at length such legislation; it is sufficient to say that in our opinion there is nothing in the soldiers' bonus law of Wisconsin conflicting with the federal legislation. The federal acts relied upon have reference primarily to the status of the soldier as such, while engaged in the service of the United States. *Konkel v. State, supra.*

The soldiers' bonus law, based as it is upon the interest of the state in the successful prosecution of the war and "as a token of appreciation of the character and spirit of their patriotic service, and to perpetuate such appreciation as a part of the history of Wisconsin," does not burden, interfere, or conflict with the several federal acts to which counsel refer.

As pointed out in *Southern R. Co. v. Reid,* 222 U. S. 424, 32 Sup. Ct. 145, acts of Congress and state laws are in conflict when, if one obeys the state law, he incurs the penalties of the federal law, and if he obey the federal law he incurs the penalties of the state law. As stated in *Missouri, K. & T. R. Co. v. Haber,* 169 U. S. 613, 18 Sup. Ct. 488, "A [state] statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the [federal] constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Without further discussion, we are satisfied that the power of Congress under the federal constitution to raise and support armies and to provide and maintain a navy does not exclude state legislation such as that here involved.

III.

It is further urged by counsel for relator that the taxing scheme embodied in the act is unconstitutional. This contention is based upon the idea that the law is in conflict with

constitutional provisions respecting special legislation, uniformity, equal distribution of burdens, and equal protection of the law. That the surtax provisions of the act in question constitute special and class legislation. The material points raised under this head are:

(a) The law is special and prohibited by sec. 31, art. IV, of the constitution and sec. 1, art. VIII, which provides that the rule of taxation shall be uniform.

(b) That the special character and inequality of the act as applied to the different forms of taxation is obnoxious to constitutional provisions because there is no basis for the inequality of burden.

(c) That the surtax provision of the act constitutes special and class legislation:

1st. That it is imposed upon a selected class of 1918 incomes.

2d. That exemptions are unequal and unreasonable.

3d. The provisions with reference to exemptions of personal property are unequal and unreasonable. This provision is claimed discriminatory, not only as between individuals but as to corporations.

4th. That there is also a lack of uniformity and equality between railroads and others taxed on an *ad valorem* basis.

No time need be spent in discussing the tax imposed not exceeding three mills on the dollar upon the taxable property of the state. This provision is included in an amendment to the statute, and provides for a general tax upon all property to meet the burden imposed by the law, not covered by the surtax, and is levied for a public purpose. The three-mill tax, therefore, cannot be open to the objection of inequality of burden, special legislation, or want of equal protection of the law.

The principal attack made by relator, as we understand the argument, is upon the surtax. The surtax provision is in effect an amendment to the income tax law by increasing the tax upon incomes. If the surtax be not open to objec-

tion under the law relating to income taxation it must be held valid. The only uniformity required under the income tax law is uniformity within the class. *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164.

The contention that the law is special and prohibited by sec. 31, art. IV, of the constitution is without merit. *Income Tax Cases, supra.* Clearly the objection cannot apply to the surtax if classification be proper and exemptions reasonable. The argument under this head may be considered under two propositions: (1) Classification, and (2) Exemptions. It is said the classification is not valid because imposed upon a selected class of 1918 incomes, hence a closed class with no opportunity for others to grow into the class. The legislature made no classification. It was confronted with the problem of having to raise a large sum of money for distribution as soon as practicable. To secure such sum it levied the same upon the basis of incomes of 1918, the tax upon which is payable in 1920, and upon the assessed value of real estate and personal property for the year 1919, the same being the resources of the next tax levy as specified in sec. 2 of the act. There was no more a classification here than there is in any case where an additional sum is added to the usual tax to be raised for any given years.

Under the decisions of this court since the passage of the income tax law we have in this state two independent systems of taxation, namely, property tax and income tax; and while the uniformity clause of the constitution applies to property tax it has no application to income tax. The amendment to the constitution which is the basis of the income tax (sec. 1, art. VIII) provides, "Taxation may also be imposed on incomes, privileges and occupations, which taxation may be graduated and progressive, and reasonable exemptions may be provided."

The proposition which confronted the legislature in the case at bar was to provide for an emergency tax and one

which would expire within the time fixed for raising the funds. The legislature, therefore, provided for raising a part of the fund by a surtax, or tax added to the normal income tax. So we must test this surtax by the same principles which apply to the original income tax law.

The taxation of persons progressively under the income tax law may be levied by the legislature and reasonable exemptions may be provided. *Income Tax Cases,* 148 Wis. 456 (134 N. W. 673, 135 N. W. 164), at p. 506. As said in that case (p. 507): "It clearly appears that taxation of property and taxation of incomes are recognized as two separate and distinct things in the state constitution; both may be levied, and lawfully levied, because the constitution says so." The court further said at page 504, "With the political or economic policy or expediency of the law we have nothing to do."

As has been repeatedly decided by this court, the legislature has a very broad discretion under the income tax law, and as regards classification it is enough that there be no discrimination in favor of one as against another of the same class, and that the method of assessment and collection of taxes is not inconsistent with natural justice. *Michigan C. R. Co. v. Powers,* 201 U. S. 245, 26 Sup. Ct. 459; *Income Tax Cases, supra; State ex rel. Bernhard Stern & Sons v. Bodden,* 165 Wis. 75, 160 N. W. 1077; *State ex rel. Manitowoc G. Co. v. Tax Comm.* 161 Wis. 111, 114, 152 N. W. 848; *Northwestern M. L. Ins. Co. v. State,* 163 Wis. 484, 489, 155 N. W. 609, 158 N. W. 328.

It is also insisted by counsel for relator that the exemptions are unequal and discriminatory in many respects and particularly as between persons and corporations and also as between corporations. There may have been within the mind of the legislature valid reasons for the exemptions made and which are complained of by the relator, and unless we can say that the exemptions are manifestly unjust, arbitrary, or whimsical, courts have no power to interfere with

the legislative enactment merely because the judicial mind might reach a different conclusion as to the policy or wisdom of the law. We must presume that in laying the tax under the law in question the legislature surveyed the whole field in determining upon a reasonable apportionment of tax burden. And the legislature had a right to take into account in levying the burdens who was best able to pay. *Income Tax Cases, supra.*

In regard to the broad discretion of the legislature, we cannot do better than quote from *Chicago & N. W. R. Co. v. State,* 128 Wis. 553 (108 N. W. 557), at p. 642:

"Under our constitution, it must be remembered, there is the amplest power on the part of the legislature to exempt an entire class of property from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the subclass is so far different from that owned by others, as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto, of substantially different legislative treatment. . . ."

"The discretion of the legislature in this field is so broad that it is not competent for the court to mark the constitutional limitations of it other than at the farthest one might go without transcending all reason." Page 655.

What constitutes proper classification has been repeatedly considered by this court and further discussion is unnecessary. *State ex rel. Risch v. Trustees,* 121 Wis. 44, 54, 98 N. W. 954; *Johnson v. Milwaukee,* 88 Wis. 383, 390, 60 N. W. 270; *Wagner v. Milwaukee Co.* 112 Wis. 601, 607, 88 N. W. 577; *Bingham v. Milwaukee Co.* 127 Wis. 344, 347, 106 N. W. 1071; *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Ladd v. M., St. P. & S. S. M. R. Co.* 142 Wis. 165, 125 N. W. 468; *Maercker v. Milwaukee,* 151 Wis. 324, 328, 139 N. W. 199. The classification here is in conformity with the rule of the

foregoing decisions. *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164.

There is no discrimination within the class. The exemptions in each class apply to every member of the class, and it is no objection that the exemptions in one class are different from those in another where there is proper classification.

The fact that the surtax of the individual begins with the fourth thousand of taxable income, while that of corporations, joint-stock companies, or associations begins with the first thousand, does not make the exemption arbitrary or whimsical, because there may have been good grounds for such difference in the mind of the legislature after a review of the whole field. The legislature obviously sought to make a fair distribution of burdens between the two classes by providing that corporations, joint-stock companies, and associations should be allowed to deduct, before the tax is computed, from net income an amount equal to six per cent. of its capital stock, surplus, and undivided profits. It is well settled that putting corporations in one class and individuals in another is proper classification. This is decided by this court in *Income Tax Cases, supra,* at page 458, where it is held that there is a substantial difference in situations between individuals and corporations which justifies the classification. A corporation is an artificial creation of the state endowed with franchises and privileges of many kinds which the individual has not. *Northwestern M. L. Ins. Co. v. State,* 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

Counsel makes the point that, since the general law provides that the income taxpayers should be entitled to an offset to the extent of their personal property and the present act denies the offset against the surtax levied for the particular purpose of the act, the present act is objectionable and discriminatory and a denial of due process. We do not regard this objection tenable. Such offset was sustained by this court in the *Income Tax Cases, supra,* and the same

objections which are raised here could have been raised with equal force there. Moreover, what we have heretofore said we think sufficient on this subject.

It is further insisted that the provision allowing corporations to deduct six per cent. of their capital stock, surplus, and undivided profits when applied to foreign corporations and companies who derive large incomes from Wisconsin business, though perhaps having but little capital invested in Wisconsin, is discriminatory, because it is applicable without exception or qualification to the income of corporations. A foreign corporation, therefore, although having a comparatively large income from Wisconsin business, with but a small part of its capital invested in Wisconsin, might by deducting six per cent. of its entire capital, surplus, and undivided profits, wipe out its entire surtax.

We do not decide whether the section as so construed would be discriminatory or not. We do not think the section should be so construed. Sec. 7 is in effect an amendment of sec. 1087*m*—6, Stats., which is a part of the income tax law. The section, as amended, therefore must be construed as a part of the income tax act. The following is a part of sub. 3, sec. 1087*m*—2:

"With respect to other income, persons engaged in business within and without the state shall be taxed only upon such income as is derived from business transacted and property located within the state, which may be determined by an allocation and separate accounting for such income when made in form and manner prescribed by the tax commission, but otherwise shall be determined in the manner specified in subdivision (e) of subsection 7 of section 1770*b* of the statutes, as far as applicable."

Taking the law as a whole, it must be fairly construed to mean that in determining the basis upon which the six per cent. deduction is to be computed, the capital stock, surplus, and undivided profits must be allocated upon the same basis as the allocation of the income tax is to be made. So con-

strued, all corporations, foreign and domestic, are treated alike, and there is no discrimination in favor of or against foreign corporations. The taxable income is derived from business and property located within the state, and in computing the deduction the basis of the deduction should be made the property out of which the income is earned. This construction is not only just and reasonable, but carries out the legislative intent and avoids the unreasonable conclusion that the legislature intended to permit foreign corporations, in many instances, to be wholly exempted from the tax.

Point is also made by relator that there is lack of uniformity and inequality of treatment as between railroads and others taxed on the *ad valorem* basis. The question discussed under this head refers to detail in the administration of the taxing power and the points urged do not seem to affect the validity of the act in question. We think this quite clear from the cases cited by relator. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557, and *Minneapolis, St. P. & S. S. M. R. Co. v. Douglas Co.* 159 Wis. 408, 150 N. W. 422.

What has been said heretofore we think sufficient to show that the question of uniformity and inequality is not involved in the point raised.

It is further urged that the right granted to county boards to elect to issue bonds is an unlawful delegation of legislative power and violates the constitutional provision that the rule of taxation shall be uniform. We do not think this position well taken. The right to levy the mill tax is not delegated to counties. The levy is a legislative act, and the right granted to the county to issue bonds is a privilege which it may exercise at its option in making provision for the payment of the tax and thereby the amount of the levy may be remitted. There is no delegation of power to the county respecting the levy. The tax under the present act is levied by the legislature and the bond issue is a mere detail regarding payment. The payment is adminis-

trative, not legislative. Under this head counsel for relator relies upon *State ex rel. Carey v. Ballard,* 158 Wis. 251, 148 N. W. 1090, but it will be seen that in that case the legislative power to levy the tax under the act there involved was delegated to a group of freeholders of the county, so there was clearly a delegation of legislative power to levy a tax, hence the case is not in point here. We do not understand that the provision with reference to the issue of bonds was intended to relieve the counties so electing to issue bonds from paying their taxes at the same time and in the same manner as counties that had not issued bonds are required to do, or to spread the period of payment beyond the time for the payment and collection of taxes.

IV.

It is further contended by relator that the duties conferred upon the recognition board provided in the act was a delegation of legislative power. We regard this contention untenable. The duties of the recognition board are purely ministerial, and under repeated decisions of this court cannot be regarded as a delegation of legislative power. *In re Appointment of Revisor of Statutes,* 141 Wis. 592, 124 N. W. 670; *Union L. Co. v. Railroad Comm.* 144 Wis. 523, 129 N. W. 605; *State ex rel. Buell v. Frear,* 146 Wis. 291, 131 N. W. 832; *Chippewa & F. I. Co. v. Railroad Comm.* 164 Wis. 105, 159 N. W. 739; *State v. Lange C. Co.* 164 Wis. 228, 157 N. W. 777, 160 N. W. 57; *State ex rel. Owen v. Stevenson,* 164 Wis. 569, 161 N. W. 1.

Various provisions of the statute recognize this rule. In *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, it is said: "It is not a delegation of legislative power to vest in the state tax commission, by law, the power of appointing assessors of incomes and fixing their salaries." In the instant case the legislature has determined the rule of law respecting the duties of the recognition board, and the determination of the facts is vested in the board. 1

Cooley, Taxation (3d ed.) 99, 100; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *State ex rel. Carey v. Ballard,* 158 Wis. 251, 148 N. W. 1090.

In view of the various statutes of this state touching this subject and the decisions of this court we regard discussion of the subject unnecessary.

V.

It is also insisted that the law in question violates sec. 2, art. VI, of the constitution, which provides that the secretary of state shall be *ex officio* auditor. The contention under this head is in effect that the power of audit is taken from the secretary of state and given to the service recognition board. We do not regard this contention tenable. The powers given to the service recognition board are of an administrative character. *State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 119 N. W. 894.

It is true that the law gives the service recognition board charge and control of the general scheme of payments and is authorized to adopt rules, uniform throughout the state, for the distribution of the funds and the ascertainment and selection of proper beneficiaries, and the amounts to which beneficiaries are entitled. But in the last analysis the secretary of state shall audit and pass upon all matters of which, under the constitution, he is *ex officio* auditor. We are satisfied that the law does not interfere with the constitutional authority of the secretary of state as auditor. *U. S. v. Sanborn,* 135 U. S. 271, 10 Sup. Ct. 812; *Rinder v. Madison,* 163 Wis. 525, 158 N. W. 302; *State ex rel. Langer v. Kositzky,* 38 N. Dak. 616, 166 N. W. 534.

It is further insisted by relator, but we think not seriously, that the provision for submission to the people of the question involved under the law as to whether the tax should be levied renders the act unconstitutional. This court has held that the legislature may make the taking effect of the law dependent upon a vote of the people. *Smith v. Janes-*

ville, 26 Wis. 291; *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 125 N. W. 961.

In closing this opinion we deem it proper to refer to a misfit of certain administrative details of the act. The proceeds of the property tax will be returned to the state treasurer along with the general property taxes not later than the second Monday of March. The income tax is not required to be returned to the state treasurer until the 1st day of May. Sec. 1121. The result will be that a portion of the money will be available for the payment of the bonuses at least six weeks before all is available therefor. Either all must wait until the 1st of May or some will be paid much earlier than others. Either solution may result in an unfortunate misunderstanding, if not dissatisfaction. We see no reason why the legislature could not have required the income tax to be returned with the general property tax, and its failure to do so was no doubt the result of oversight. However, if the various county treasurers co-operate in the spirit prompting the enactment of the law, the administrative hitch pointed out may be avoided. While they are not required under the law to make return of the income tax until the 1st day of May, they are not obliged to withhold such tax until that date, but are at liberty to remit the same as soon as it comes into their possession. We have no doubt that the county treasurers will cheerfully co-operate, to the end that the money available for the payment of these bonuses will be seasonably transmitted to the state treasurer, enabling him to make prompt payment, and thus avoid resulting annoyance and misunderstanding.

It follows that the demurrer to the complaint must be sustained.

By the Court.—The demurrer to the complaint is sustained, and the action dismissed.

STATE EX REL. ATWOOD VS. JOHNSON and others.
[Soldiers' Educational Bonus.]

November 8—November 17, 1919.

Soldiers' educational bonus: Taxation: Public purpose: Bonus as an expression of gratitude: Stimulation of patriotic duty: Bonus not compensation to recipient: Constitutional law: Governmental function: Insuring domestic tranquillity: Providing for common defense: Troops furnished by state to nation: Courts: Wisdom of legislation not question for courts: Practical construction of constitutional provisions: States: Loaning credit or creating debt: Aid to religious schools.

1. The purpose of the Educational Bonus Law (ch. 5, Laws 1919, Special Session) as gathered from the act itself supplemented by contemporaneous history, is to express by material means the gratitude of the people of the state to those of its citizens who signally and heroically performed the task that called them into action during the recent emergency, and primarily to stimulate patriotism and quicken the perception in our citizens of their sacred duty to defend the government in time of need. Whether the volunteer system of the Civil War or the selective service method be employed, stimulation of patriotism is necessary because heroic and successful action in an emergency springs from patriotic desire and not from compulsion.
2. The gift or bonus provided by the act is not granted by way of extra compensation for services rendered, nor to reimburse the soldier, but to express the gratitude of the state and stimulate love of country in the donor, the recipient, and the public at large, to the end that an impressive object lesson in patriotism be conveyed.
3. If the important documents that have given birth to our government be examined to see what their framers considered governmental or public purposes, it will be seen that the Declaration of Independence, Articles of Confederation, and our National and State Constitutions expressly declare that the insuring of domestic tranquillity and providing for the common defense are strictly governmental functions; and the ultimate sanction behind security is the force of the militia, just as the compelling power of a court's decree is the power of the state to enforce it.

4. Unless it clearly appears that the expenditure of the money levied will have no tendency to effectuate the purpose sought to be accomplished the act is valid, for its purpose is to promote in the citizenry of the state a readiness to serve when its tranquillity is threatened; and the stimulation of this patriotic devotion is a governmental function.
5. Whether the law will effectuate its purpose sufficiently to justify the expenditure of money is a legislative question within the boundaries of the constitution; and the legislature might well say that an appreciation of the services rendered will tend to stimulate others in the future, that it will create a reciprocal understanding and confidence between soldier and citizen, permitting those who were debarred from active service to make an offering to those who served, and that the gratitude of the state should be expressed to those of our citizens who aided in repelling the invasion of our national security.
6. If the giving of money to returned soldiers is a public purpose, as was held in the *Cash Bonus Case* (*ante*, p. 218), the giving to them of an education is even more a public purpose, because in both peace and in war a free government's guaranty of continuity and security lies in the education of its people.
7. The federal government being a government of the states that compose it, a state furnishing troops to defend the nation defends itself; and the beneficiaries of the act were not agents of another government so that the state is precluded from granting a bonus to those of its citizens who were inducted into the national service. [Whether the state could lawfully extend the bonus to other than military servants furnished by it, not decided.]
8. Legislative enactments in Wisconsin and other states during the Civil War and thereafter, the policy of the federal government from an early date in regard to pensions, and contemporaneous legislation in nearly every state in the Union appropriating money to aid the returned soldier, while not conclusive, are very persuasive as to what is a public purpose, and will control in the absence of specific, express, or implied constitutional language to the contrary. *State* v. *Whitcom*, 122 Wis. 110, distinguished.
9. By the act the state does not lend its credit or create a debt, contrary to secs. 3 and 4, art. VIII, of the constitution, as the money is levied for the purpose of making a gift revocable at will and no contract relation is established. [Whether when the money is collected and is in the hands of the state treasurer a beneficiary could compel its payment, not decided.]

10. Financial benefit does not accrue to religious schools from the act, as they are not enriched by the service they render, only the actual increased cost to such schools occasioned by the attendance of the beneficiaries being paid to them.

ORIGINAL ACTION brought in this court to test the constitutionality of ch. 5, Laws 1919, Special Session.

The attorney general having declined to bring the action, the court granted leave to the relator to prosecute the same. The defendants are charged with the administration of the act, and judgment is prayed that this court determine the validity of the act and in case it is found invalid that its enforcement be restrained.

The complaint charges substantially the same grounds of invalidity charged in the *Cash Bonus Case,* decided herewith (*ante,* p. 218, 175 N. W. 589), and in addition thereto it is urged that the act in question is void because (a) it lends the credit of the state to private individuals; (b) a state debt is incurred, contrary to the provisions of secs. 3 and 4, art. VIII, of the constitution; and (c) it gives financial aid to religious schools.

The class to be benefited is thus defined in the act:

"Sec. 37.25 (1) Any person discharged, or released, or furloughed subsequent to April 7, 1917, upon honorable conditions, from any branch of the military or naval service of the United States including all Red Cross and other nurses in military camps or hospitals who were a part of the military or naval forces of the United States in this country or overseas during the war against Germany and Austria, and who at the time of entering such service, which must have been prior to November 1, 1918, was a resident of this state, and who was in the service at least three months, and who desires to continue his education in any of the public elementary, high, or vocational schools of the state, or in special schools organized for this purpose, or in the county training or county agricultural schools, or in the mining school, the normal schools, Stout Institute, or in the University of Wisconsin, or in any institution of learning in this state at which was organized an S. A. T. C. [Student Army Training Corps] or in any other institution of high

school or collegiate grade in the state not run for profit shall, under rules and regulations to be prescribed by the state board of education, be entitled to receive thirty dollars per month while in regular attendance as a student at any such institution, but not to exceed a total of one thousand and eighty dollars in lieu of the soldier bonus provided for in chapter 667 of the Laws of 1919, except as hereinafter provided. The benefit of this act shall not accrue to any person for time spent while taking training in any student army training camp, nor to any person, who, though inducted into service, did civilian work at civilian pay."

The act contains detailed provisions for its administration by the state emergency board and the Wisconsin state board of education, and levies a tax for five years for the expenses of administration and for the money to be expended thereunder. Such tax is not to exceed one mill on each dollar of the assessed valuation of property and a surtax on taxable incomes of individuals varying from seven-twentieths of one per cent. on the fourth thousand to one and two-tenths per cent. on taxable incomes of over $13,000. A surtax is also levied upon the taxable incomes of corporations, joint-stock companies or associations ranging from four-tenths of one per cent. on the first thousand to one and two-tenths per cent. on all taxable incomes in excess of $7,000. The first surtax is levied on taxable incomes for 1918.

The act also provides (sec. 37.253) that:

"(3) The services provided for in sections 37.25, 37.251, 37.252, and 37.253 shall be paid for by the state on the basis of the actual increased cost of operation in excess of the cost of the institution if such legislation had not been passed, and not at the ordinary rate of individual courses."

The attorney general entered a general demurrer to the complaint.

Harry L. Butler of Madison, special counsel for the State.

The *Attorney General* and *M. B. Olbrich,* deputy attorney general, for the defendant state officers.

For the defendants other than state officers there was a brief by *Crownhart & Wylie* of Madison, and oral argument by *Charles H. Crownhart.*

Roy P. Wilcox of Eau Claire appeared as *amicus curiæ* at the request of Wm. C. Johnson Post and Everett Hale Post of the American Legion.

The following opinion was filed February 10, 1920:

VINJE, J. The main argument against the constitutionality of the Educational Bonus Law as well as that against the constitutionality of the Cash Bonus Law, decided herewith (*ante,* p. 218, 175 N. W. 589), is that the money levied by it from the taxpayers of the state is not to be spent for a public or governmental purpose. It is argued that its only justification is gratitude for or appreciation of past military services; that the recipients thereof form no class by themselves distinguished by any characteristics which could form a legitimate basis for classification except past military service; that since it has been held, as it was in *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468, that past military service did not exempt one from license fees or police regulations imposed upon an occupation, such service could not form the basis for a classification for recipients of a bonus from the state for educational purposes; that though education is a benefit to the state it is no more so in one class of its citizens than in another, and therefore the classification created by the act is unconstitutional.

This act, unlike that of the Cash Bonus Law (ch. 667, Laws 1919), does not declare the purpose of the bonus given the recipients to be "a token of appreciation of the character and spirit of their patriotic service and to perpetuate such appreciation as a part of the history of Wisconsin." But it is not essential that the purpose of the act should be declared therein if such purpose can be gathered from the act itself, supplemented if need be by contemporary history. In this case there can be no doubt about its

purpose. Public declarations have been too frequent and specific, and public feeling is too deep and pervasive, to admit at this early day of any mistake relative thereto. Its purpose was to show by material means, of such character and such proportion that it could not be misunderstood as mere idle expressions, the deep gratitude of the people of the state to those who so signally and heroically performed the task that called them into action, and who stamped the American—the Wisconsin—soldier as of the bravest and most efficient among the soldiers of the world. But this purpose, though public, appropriate, and laudable, was not the sole or even the main purpose of the act. The main purpose was to stimulate patriotism, to quicken the perception in our citizens that there is a sacred duty to defend the government in time of need, as well as to demonstrate that such defense is appreciated,—that republics are not ungrateful.

Nor is the gift here made an extra compensation for services rendered, though it must be admitted that a pure gratuity is sometimes called extra compensation. But such compensation, strictly speaking, is given to reimburse the recipient financially for service rendered, so that the total money consideration will equal the money value of such service. Its whole sanction lies in the fact that inadequate financial compensation was given in the first instance, and that in order to make it adequate additional compensation must be made. It is granted purely on a money basis, without regard to its effect upon the donor, the recipient, or the general public. A gift like this rests upon no such foundation. Its purpose is not to make the soldier financially whole, but to express gratitude and stimulate love of country in those that give, in those that receive, and in the public at large—to the end that an impressive object lesson in patriotism may be engraved in the hearts of all.

Sometimes purposes are so fundamental that they are lost sight of in a casual consideration. Their scope is so broad

and their object so pervasive that one often forgets that other more obvious but less important purposes lie within the boundary circumscribed by them. Thus, the power exercised by the courts and the binding effect of their decisions are often matters of comment. In one sense such statements are true, but upon a final analysis it will be found that the compelling sanction of the court's decree is force pure and simple. The power of the state and its readiness to carry into effect the decree of its courts is what gives them their real efficiency. Without such force and readiness their decrees could be laughed to scorn with impunity. Thus we often lose sight of basic causes that are seldom invoked and assume that other causes dependent upon them are the real ones.

The constitutional admonition (sec. 22, art. I) that a "frequent recurrence to fundamental principles" is essential to the maintenance of "the blessings of a free government" may well be invoked here. Let us briefly examine the important documents that have given birth to our government to see what their framers considered governmental or public purposes.

The Declaration of Independence states:

"We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men."

Here, of course, is a very broad and general statement, but no one is so dull that he cannot spell out of it the specific fact that governments are instituted for the purpose of securing the enjoyment of liberty to the peoples thereof, and no one is so dull that he does not understand that in order to enjoy liberty within a nation there must be no foreign coercive force operating from without, and that it is a governmental function to repel such force if sought to be applied.

In the Articles of Confederation the statement is somewhat more specific, for there it is declared (art. III) that the "States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare."

In the preamble to the federal constitution the purpose of the new government is thus stated:

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

The preamble to our state constitution contains substantially the same language, applying it to our own state government.

Thus we see that these great documents expressly declare that the insuring of domestic tranquillity and the providing for the common defense are strictly governmental functions. Indeed, the very conception of a free government is bottomed upon the hypothesis of security from within and from without. That is the indispensable prerequisite of every stable government, and to maintain such security is its first duty. But the ultimate sanction behind security, both from within and from without, is force—the force of the militia, that necessary and integral part of every government expressly provided for in our federal and state constitutions.

It may be said that all this is trite and is conceded by everybody. If conceded, the concession goes deep enough to validate the law attacked, for its purpose is to promote in the citizenry of the state a readiness to serve it whenever its domestic tranquillity is threatened either from within or from without. That since it is the duty of government to maintain domestic tranquillity, and since that can success-

fully be done only by the patriotic devotion of its citizens, the stimulation of patriotism becomes a public or governmental function. If it be said, as it is, that the law will not effectuate that purpose sufficiently to justify the expenditure of the money levied, the juristic reply is that that is a legislative question pure and simple, unless it clearly appears that it has no tendency at all to do so—a position assumed by no one; and that it is not the function of courts to sit in judgment upon the wisdom of a legislative policy that lies well within the boundaries of the constitution.

The legislative answer—warranted by the importance of the question involved—is that appreciation of service well rendered by those who have received the benefit thereof tends to better service of a like kind in future; that its effect is to stimulate others to become worthy of like appreciation; that it creates a relation of reciprocal understanding and confidence between soldiery and citizenry, thus promoting that unity of thought and feeling that must ever exist between the two if war is to be effectively waged; that, as many a faint and weary soldier's heart was strengthened and sustained by the knowledge that "the home fires were kept burning," and that the prayers, hopes, and aspirations around those fires supplemented his own, so will this gift quicken and perpetuate in the returned soldiers that mutual feeling thus engendered and make for better citizenship; and the donors who were largely debarred from taking an active part in the war will find their patriotism rekindled by being permitted to make a small offering to those who offered all, and that since the continuity of a republic depends largely upon the patriotism and the enlightenment of its people, the stimulation of both becomes not only a public purpose but a public necessity. Both must be zealously fostered in order to maintain national security. This the legislature might well say furnishes a valid basis for the gift.

Our government declared that our national security was

not only threatened but invaded before we entered the conflict. United States ships upon the high seas are United States territory, and such ships upon their lawful journeys, recognized as lawful not only by international law but by specific treaties with the aggressor, were destroyed without warning. To repel such invasion and to help crush the military spirit that disregarded the obligations of both treaties and international law we entered the conflict and assisted materially in bringing it to a successful close. For such service rendered by the recipients of this act gratitude must needs express itself in a substantial way. To do otherwise were a mere perfunctory act.

If, as held in the *Cash Bonus Case* (*ante*, p. 218, 175 N. W. 589), the giving of money to soldiers, which they may spend as they choose, is a public purpose, much more so must be the giving to them of an education. A free government's best guaranty of continuity and security lies in the enlightenment of its people. This is true both in time of peace and in time of war. The proved efficiency of our soldiers was in a large measure due to their excellent education, both technical and general; in their power of initiative; and in their willingness and ability to assume personal responsibility whenever the occasion demanded it.

But it is argued in effect that since we have abandoned the volunteer system of the Civil War and resorted to the draft system, stimulation of patriotism is not necessary; for the non-patriotic as well as the patriotic soldier can be drafted and made to serve. Yes, he can be drafted, and he can be made to serve; but think you the French soldiers at the Battle of the Marne exclaimed, "They shall not pass!" because they were drafted, or because they loved France? To their honor let it be said that their heroic and successful defense sprang from desire, not from compulsion.

It is also contended that the beneficiaries of the act were in the service of the United States and not in the service of

Wisconsin and therefore our state cannot lawfully spend money in gratuities to agents of another government. The federal government is our government none the less because we have a subordinate independent government of our own within it. The federal government in time of war must call upon the citizenry of the states for troops, it has none others. We are an integral part of the nation, hence a defense of the nation is a defense of us. In furnishing troops to the federal government we are in reality furnishing them to ourselves because they are to be used for our benefit. And since the recipients of the act must be residents of the state, we are limiting the bonus to the military servants furnished by our own state. Whether or not we could lawfully extend it to others it is not necessary to decide.

We have so far discussed the question from the standpoint of what is a public purpose within the meaning of the organic acts creating our government. Let us now see if such construction has found confirmation in legislative acts in our state and elsewhere. Space will not permit of a detailed statement of such acts, but only a summary thereof. During the Civil War and thereafter from 1861 to 1872 no less than eighteen laws were enacted by our legislature providing for war loans and voluntary aid to soldiers and their families, the latter alone carrying appropriations under which expenditures to the extent of over $2,700,000 were made. Counted in present ability to pay as compared with the state's ability at the time the sums were levied, this would equal a present expenditure of over fifty million dollars.

Many other states, among which were Maine, New Hampshire, Vermont, Massachusetts, New York, New Jersey, Michigan, and Connecticut, also enacted laws providing for bounties or extra compensation to its Civil War veterans.

The federal government from an early date has granted

pensions to its soldiers and their dependents under a constitution no broader in its scope as to the public purposes of its government than is our own. Since 1865 it has spent over $5,250,000,000 for such purposes. And Congress has done this under a grant of power which must be found expressly or impliedly in the constitution, while our legislature acts under a grant of power that is limited only by what is expressly or impliedly prohibited by our constitution or by that of the United States. Hence, if the United States has lawfully granted pensions or bounties to its soldiers, it follows that we can lawfully do the same to ours. No one has successfully questioned the right of the United States to grant pensions or bounties.

Though our country did not enter the war till early in 1917, thirty-eight states besides our own have already enacted over one hundred and twenty separate laws appropriating money for expenditure incident to the enlistment and service of its soldiers therein. These laws range in content from cash bonus, land settlements, extra compensation, memorial funds, investment funds, celebration funds, reimbursement funds to schools, exemptions from certain public burdens, educational benefits, care for returning soldiers, aid to dependents of soldiers, to the appropriation of money for medals or engrossed certificates to be given to honorably discharged soldiers, and carry appropriations reaching millions of dollars, the bulk of which is for extra compensation, land settlements, and cash and educational bonuses.

It will thus be seen that the legislative construction in nearly every state in the Union is in accord with that of Wisconsin. While such construction is not conclusive upon courts it is very persuasive and will control in the absence of specific, express, or implied constitutional language to the contrary.

That the construction sustaining the constitutionality of the act is in consonance with judicial interpretation of

similar acts elsewhere and with former decisions of this court is shown in the *Cash Bonus Case,* and need not be repeated here.

The contention that the case of *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468, is authority for the invalidity of this act is not tenable. There it was held that past military service did not exempt persons from the general tax laws and police regulations of the state because there was no valid basis for making a distinction or class for such purposes after they have become a part of the mass of citizenship. But it is there said:

"The federal government does, without question, discriminate by direct payment of money by way of pensions. To that end, doubtless, those who served the government in its wars are a legitimate class distinct from the rest of the community by reason of the service which they have rendered."

The latter situation is the one before us, and the cited case sustains the conclusion here reached.

It is also urged that under the provisions of the act the credit of the state is given to individuals and a state debt is incurred, contrary to the provisions of secs. 3 and 4, art. VIII, of the constitution. The money is levied for the purpose of making a gift—a pure gratuity—revocable at will. The law establishes no contract relation such as can compel its levy. Nor does it create a debt. *State ex rel. Owen v. Donald,* 160 Wis. 21, 59, 151 N. W. 331. Whether when the money is collected and is in the hands of the state treasurer a beneficiary clearly within the law could compel its payment need not now be decided. It is sufficient to hold that the state does not lend its credit or create a debt within the meaning of the constitution by making a voluntary lawful gift to a number of its citizens.

The contention that financial benefit accrues to religious schools from the act is equally untenable. Only actual increased cost to such schools occasioned by the attendance

of beneficiaries is to be reimbursed. They are not enriched by the service they render. Mere reimbursement is not aid. *Dorner v. School Dist.* 137 Wis. 147, 118 N. W. 353.

Questions raised but not herein treated are ruled by the *Cash Bonus Case,* decided herewith (*ante,* p. 218).

By the Court.—The demurrer to the complaint is sustained, and the action is dismissed upon the merits.

EDWARD E. GILLEN COMPANY, Respondent, vs. JOHN H. PARKER COMPANY, Appellant.

February 5—March 4, 1919.
October 11—December 2, 1919.

Building contracts: Stipulation as to amount due to subcontractor: Judgment therefor: Payments: Interest: Additional claim for damages on account of delays: Remedies: Contract construed: Liability of general contractor: Damages: Proper elements: Extra services of officers of corporation: Appeal: Waiver of objections: Option to take judgment for reduced amount.

1. In an action by a subcontractor against the general contractor for a building, a stipulation recited that defendant had agreed to pay plaintiff a certain sum with interest after a specified date, being that part of plaintiff's demand claimed to be due and owing on the contract price, and that plaintiff had executed a voucher for said sum, and then provided that such partial payment and voucher should not prejudice plaintiff's right to recover, in the action, damages claimed by it to have been sustained by reason of delays, for which defendant is alleged to be responsible, in the doing of the work, and that the trial of the action should be confined solely to plaintiff's claim for such damages. *Held,* that at the end of the trial, upon judgment being rendered for plaintiff, the court properly included therein the sum so agreed upon, with interest from the date specified.
2. Upon the motion, presumably made under sec. 2892, Stats., for judgment for the amount fixed in such stipulation, the court might order defendant to satisfy that part of plaintiff's claim and might enforce such order as it enforces a judgment or provisional remedy, without waiting until the termination of

the litigation on the question of damages on account of said delays.

3. The liability admitted by said stipulation was a present liability, payable presently in money, and its payment was not subject to provisions of the contract as to when payments thereon should be made and that such payments should be partly in money and partly in stock of the corporation owner of the building.

4. In an action involving a claim for damages arising from breach of a contract, where the amount of such damages cannot be ascertained from the contract itself and a consideration of evidence is required, an additional sum may be allowed, equal to interest on the damages recovered at the statutory rate from the time when the breach occurred.

5. Delays in the doing of the work of a subcontractor, for which damages are claimed on the ground that they were caused by defaults of the general contractor, are *held,* upon the evidence in this case, not to have been shown to be the result of the exercise by the general contractor of a power, given to him in the subcontract, to suspend at any time the whole or any part of the work therein contracted for, without compensation to the subcontractor other than extending the time for completing the work.

6. Nor, under other provisions of the subcontract,—including a provision to the effect that should the subcontractor be obstructed or delayed by the neglect or delay of any other contractor there should be an allowance of additional time to him for the completion of his work,—and under the evidence as to letters written by the subcontractor to the general contractor in regard to delays and hindrances to his work, can it be held as matter of law that the allowance of additional time was the sole remedy of the subcontractor for such delays.

7. The subcontract in question having neither expressly provided for liability on the part of the general contractor for delays caused by it, nor expressly excluded its liability for monetary damages for such delays, the general rule applies that where labor and materials are to be furnished by the one party and to be paid for by the other, and the one furnishing such labor and materials is dependent to some extent upon the other party performing his part or providing for the prompt performance by others of a portion of the work, there arises by implication an obligation of such other party, not only to refrain from interfering with or impeding the contractor in the performance of his work, but also to do all that is reasonably necessary in order to enable such contractor to perform

the work; and for a failure in either respect damages can properly be awarded to the party so delayed or impeded.

8. Although the subcontract in question did not make the defendant (the general contractor) a guarantor of the prompt performance by other subcontractors of their respective subcontracts, yet, the jury having been properly instructed that in order to find that defendant unreasonably obstructed or delayed the progress of plaintiff's work they must find that there was some direct interference by defendant or failure to do what it could reasonably be expected to do, under the circumstances, to see that there was no interference by other subcontractors with plaintiff's progress, and the defendant having made no attempt at the trial to separate the delays directly caused by itself and those due to the faults of the other subcontractors and to have the latter excluded from the consideration of the jury, and there having been beyond doubt some delays for which defendant should be held liable in damages to the plaintiff, this court cannot, upon the record on appeal, carve out from the general finding as to the amount of damages such delays as might have been excluded.

9. For delays in the work of a subcontractor for pile-driving, due to the general contractor's wrongful insistence that such subcontractor was bound to remove certain old foundation walls, the general contractor was responsible and liable in damages.

10. Where a corporate subcontractor was a going concern doing other work during the period in which it was performing its subcontract, and did not employ or retain the services of its officers particularly with reference to such contract, and did not actually pay them any more than it would otherwise have done during that year, it cannot recover, as damages on account of delays due to fault of the general contractor, the value of its officers' extra services rendered necessary by said delays.

11. It appearing that there was substantial error in permitting the jury, against objection, to consider in assessing the damages the value of such extra services of plaintiff's officers, a new trial on the question of damages is directed unless plaintiff shall elect to take judgment for the reduced sum remaining after deducting the amount which it claimed on account of such services from the damages found by the jury.

12. Where, in the action for damages on account of said delays, no proper objection was made at the trial to elements of damage which the jury were permitted to consider, this court cannot, on appeal, attempt to pick out, as improper, particular portions of such elements, some parts of which were proper.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Modified and affirmed.*

The defendant, a New York corporation, was the general contractor for the removing of buildings then standing and the construction of a two-story and basement building in the city of Milwaukee, known as the Plankinton Arcade, on a site with north front on Grand avenue, extending from West Water to Second street on the west. The defendant let a number of subcontracts for the doing of the work, and one of such with plaintiff for the pile-driving and work incidental thereto. The general form of these subcontracts was substantially the same.

The plaintiff's contract of January 13, 1916, required the work to be started under it on or before January 14th and to be completed by February 14, 1916.

Article I provided for the work to be done by plaintiff and in substance as follows: All the labor and material required for the furnishing and driving of the necessary piles for the new building; excavating all pier holes for all column foundations, carting such excavated material from the premises, cutting off all the piles in the pier holes to the required levels; the sheet piling and shoring up of the street and alley banks. It also provided that the work was to be done in strict accordance with the plans and specifications and under the direction of the general contractor.

Article VII provided that "the subcontractor shall and will proceed with the work, and every part and detail thereof, in a prompt and diligent manner, and shall and will do the several parts thereof at such times and in such order as the general contractor may direct, and shall and will wholly finish the said work according to the said drawings and specifications and this contract, on or before the 14th day of February, 1916." (A similar provision except for the necessary changes of date appeared in all of the other sub-

contracts.) It also provided that time was made the essence of the contract, and that in default of the completion within the time or times above specified the subcontractor shall pay to the general contractor $100 for every day thereafter that the said work shall remain unfinished as and for liquidated damages, not as a penalty.

"Article VIII. The subcontractor shall not cause any unnecessary hindrance or delay to other contractors on said building, and shall pay all damages done to the work of such other contractor by its employees. Should the subcontractor be obstructed or delayed in the prosecution and completion of the work by the neglect, delay, or default of any other contractor, . . . then there shall be an allowance of additional time beyond the date set for the completion of the said work; . . . and the general contractor shall award the additional time to be allowed, which shall be the same as is allowed to the general contractor by the architects for the same cause; but such extension shall not otherwise affect the obligations of the subcontractor hereunder."

In the provision as to the payment for the work to be done by the plaintiff it was agreed that ninety-five per cent. of such payments was to be in cash and five per cent. paid in certain stock of the company erecting the building. "The final payment shall be made thirty days after the work in this contract is complete, finished, and accepted, . . . and the general contractor shall have received its final payment." A further provision was:

"Article XXIII. The general contractor shall have the right, at any time, to suspend the whole or any part of the work herein contracted to be done, without compensation to the subcontractor, other than extending the time for completing the whole work for a period equal to that of such suspension."

This action was commenced in February, 1917, and the complaint alleged the making of the contract; that the work was completely finished and accepted on or about August 26, 1916; and that final payment became due thirty days

thereafter, and that under the first cause of action there was due the following items:

The balance upon contract price..	$5,006 99	
The balance on agreed price of extras	1,395 43	$6,402 42
And the further sum of.....		16,043 54

—being damages accruing to the plaintiff by reason of the alleged breach by defendant of its implied agreement to do everything necessary to enable the plaintiff to commence the work and complete the same within the time specified in the contract; and that by its failure to permit the plaintiff to occupy the premises for the doing of its work it was so delayed and thereby lost the use of its equipment and appliances and the productive services of its employees and agents and forced to devote additional labor, engineering service, and superintendence to said work.

For a second cause of action it alleged an extra contract for the doing of certain sheet piling in connection with the same building at the agreed price of $1,625, none of which had been paid.

Before the trial a written stipulation was entered into:

"Whereas the defendant, *John H. Parker Company,* has agreed to pay that portion of the plaintiff's demand in the above entitled action which is claimed by plaintiff to be due and owing upon the contract price specified for the work described in the complaint, and whereas the said parties have agreed that such portion of the plaintiff's demand reasonably amounts to the sum of $8,275 and plaintiff has executed and delivered to defendant a voucher for said amount, a copy of which voucher is annexed hereto and marked Exhibit 'A,' and the defendant has agreed to pay said amount to plaintiff with interest from June 1, 1917, unless paid prior thereto:

"Now, therefore, it is stipulated and agreed that said partial payment and the execution and delivery of said voucher shall not be deemed an accord and satisfaction between the parties and shall be without prejudice to the right of the plaintiff to recover damages sought to be recovered in the

above entitled action in consequence of the alleged breach by the defendant of the alleged implied obligation to avoid hindering and obstructing the work of the plaintiff.

"It is further stipulated and agreed that the plaintiff shall make no claim upon the trial of the above entitled action to the payment of any portion of the stipulated contract price, but that the above entitled action shall be confined solely to the plaintiff's claim for damages; and it is further stipulated and agreed that the voucher hereunto annexed shall not be used in said action by either party and shall be excluded from evidence if offered." Dated May 25, 1917.

The receipt was as follows:

"Received of the *John H. Parker Company* $8,275, being the amount due the undersigned upon the contract price agreed to be paid the undersigned for work, labor, and materials furnished in connection with the pile-driving contract for the construction of the certain structure known as the Plankinton Arcade in the city of Milwaukee, and in consideration of said payment the undersigned hereby releases the Plankinton Arcade Company from any and every claim which the undersigned may have against it in any way arising out of or connected with the construction of said Plankinton Arcade;" and was signed by plaintiff.

A motion was thereupon made by the plaintiff for judgment for the amount claimed to be conceded due and for other relief before another branch of the circuit court than that which tried the cause. The motion for judgment was denied, but amended pleadings were permitted.

By supplemental complaint the plaintiff alleged substantially both causes of action as in the original complaint, but inserting as an additional allegation in each the making of the stipulation above set forth.

By supplemental answer the defendant admitted the making of such stipulation and that

"the defendant agreed that the amount of the plaintiff's claim upon the contract price for work mentioned and described in the complaint lawfully amounted to the sum of $8,275 and that the defendant was indebted to the plaintiff upon the contract price of said work in said sum, and

the defendant agreed to pay, and the plaintiff agreed to accept, said sum as and for the unpaid portion of the contract price for said work; but this defendant denies that it compromised and agreed to pay the same on or about the 1st day of June, 1917, and alleges that the said agreement was a stipulation evidentiary in its character and that said amount was only payable under the terms of the contract when the amount due under the contract was, by the terms of the contract, due from the defendant to the plaintiff."

The plaintiff complied with a written order given it by the defendant of January 8th and brought one of its pile-drivers to the edge of the site in readiness to proceed on January 13th, the date of the contract. By January 20th it had its second pile-driver near by. On February 15th it was first able to place one of its pile-drivers into the excavation ready to commence driving piles. Numerous interruptions were had in its work, largely on account of the failure of the contractor for the excavation, whose work necessarily preceded that of the plaintiff, to make sufficient progress. The work appeared to have been, at the respective dates, as follows: February 24th the excavation was 50 per cent. finished, the piling 17 per cent.; on March 18th the excavating 76 per cent., the piling 50 per cent.; April 9th the excavating 88 per cent., the piling 61 per cent.; by May 25th the piling was 77 per cent. completed; on June 17th the excavating was completed and the piling then 82 per cent. completed. Subsequent interruptions occurred, and on June 26th plaintiff started again with the piling and by July 7th had finished it. Some other details of the work were subsequently done by plaintiff and finished about August 26th.

It appeared that on February 12, 1916, an injunction was obtained and thereafter continued preventing the defendant and the American Wrecking Company, the then subcontractor for the demolishing of the buildings on the site, from interfering with the work with the ground floor

and certain portions of the so-called Birchard Block, a building on the northeast corner of the site and then occupied by the A. Spiegel Drug Company under a lease which did not expire until May 1, 1916. On March 14th a stipulation was made in the suit in which the injunction was obtained by which the drug company consented to give up possession of said premises to the defendant on April 1st, rather than wait until the termination of the lease.

On the southeast corner of the same site certain stone foundations had not been removed at the time the plaintiff was desirous of driving piles in the same place. Defendant's attention was called to this, and it refused to require the excavating contractor to remove such foundations or do the work itself, insisting that under the contract between the parties hereto it was incumbent upon plaintiff to remove such walls. The matter was taken up by plaintiff with the architects, who determined, under the arbitration clause in the contract, that it was not a part of plaintiff's obligation to remove such wall. After some delay the defendant made arrangements for such removing, causing a delay of from at least ten days to two weeks in plaintiff's work.

At about the time the excavating had reached the Birchard Block in the northeast corner, the American Wrecking Company, which had the subcontract for the wrecking of the building on the site, left the premises, and on April 9th the excavating contractor, being unable to work at this corner, also left the premises and returned under a new or modified contract with the defendant about May 25th. A petition in bankruptcy was filed against the American Wrecking Company June 2, 1916, and about April 7th a new contract was made with the Milwaukee Wrecking Company under which the wrecking of the buildings was finally completed.

There was testimony during the trial that attempts had been made by the defendant to obtain additional shovels or excavators to expedite the work. Defendant offered testi-

mony to show that, owing to the situation and the labor market and questions arising on account of the rules and regulations of the various unions, such shovels could not be obtained. Its superintendent also testified that he had attempted to get the bonding company which had given security for the performance of the work by the American Wrecking Company to take over its work when it became remiss.

During the period between January 13th and July 7th the plaintiff took and was doing work on other contracts and from time to time used portions of its equipment and drivers on such work, but giving credit on its claim against the defendant for such period of time as such respective items of equipment were so otherwise used.

September 30, 1916, the plaintiff, on one of the forms of the defendant, presented its application for final payment on account of the work done by it. In such application was the following: "Damages caused by delays to our work by your failure to have premises ready for us to proceed at time agreed, $2,500." By letter of December 4, 1916, of plaintiff to the architects, the plaintiff speaks of this prior claim of $2,500 and states with reference to it: "This was a lump-sum estimate. We have since, with the assistance of a certified public accountant, gone carefully into the matter and find this damage to have reached a much larger amount, and therefore it is omitted from the copy of the statement attached."

At the close of plaintiff's testimony defendant moved for a nonsuit on the grounds: (1) That upon the express contract in this case there cannot be any implied contract relating to the subject matter of damages and that the plaintiff's cause of action is based upon implied contract. (2) That under the contract there was a provision whereby plaintiff was to have an extension of time to do its work equivalent to the delay occasioned it by the architect, the principal contractor, or a subcontractor; that therefore there

can be no claim for financial damages. It relied on this point upon article XXIII, above stated, providing for a suspension of the work in whole or in part by the principal contractor. (3) That the action was prematurely brought, and no recovery can be had under it because the amount, pursuant to the provisions of the contract, was not due at the time the suit was commenced. Plaintiff's counsel then stated that no claim was made under any implied contract, but under an implied duty arising out of the express contract.

At the close of the testimony the defendant moved for a directed verdict in its favor as to the portions of plaintiff's claim on account of money due, for the reason that the action is prematurely brought, and in relation to the matter of damages for the reasons presented on the motion for nonsuit, and for the further reason that it appears from the testimony that a portion of the delay in the performance of the work was the plaintiff's own delay, and that where delay has occurred, and both the owner and the general contractor have contributed to that delay, the subcontractor cannot recover, because the court will not apportion the results of that delay and give the one any remedy against the other. The defendant's motions for a nonsuit and for a directed verdict were severally denied and due exceptions taken thereto.

The special verdict as answered by the jury found substantially as follows: (1) That the plaintiff was able, ready, and willing, during the time in question, to diligently prosecute the work; (2) that except so far as delayed by defendant plaintiff did prosecute its work with reasonable diligence; (3) that the defendant delayed the plaintiff's work "by failing to make reasonable effort to prepare, or cause the preparation of, the contemplated excavation at a rate which would enable the *Gillen Company* to begin, prosecute, and complete its work within the time fixed by the contract;" (4) that the defendant unreasonably obstructed,

hindered, and impeded the prosecution of the work by plaintiff; (5) that by reason of what was found in the third and fourth questions the reasonable cost to plaintiff was necessarily increased; (6) that such necessary increase was $7,713.

No requests appear to have been made for the submission of any other than these questions.

Thereupon judgment was entered on April 15, 1918, for the following items:

Damages in special verdict	$7,713 00
Interest thereon from July 7, 1916	820 15
Amount admitted in stipulation	8,275 00
Interest thereon from June 1, 1917, pursuant to stipulation	433 03
Costs	149 90
	$17,391 08

From such judgment the defendant has appealed.

For the appellant there was a brief by *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, attorneys, and *William F. Kimber* of New York City, of counsel, and oral argument by *F. L. McNamara* of Milwaukee.

For the respondent there was a brief by *Simmons & Walker* of Racine and *James D. Shaw* of Milwaukee, and oral argument by *Mr. Shaw.*

The following opinion was filed March 4, 1919:

ESCHWEILER, J. The material points upon which the appealing defendant challenges the rulings of the court below and its disposition of the case are substantially as follows:

First. In entering judgment for $8,275, the amount fixed by the stipulation recited above of May 25, 1917, on the grounds: (a) that such amount, by the terms of the stipulation referred to, is out of this case and could form no part of the judgment herein; and (b) that in any event it could not be allowed until and after the defendant itself had been paid its final balance due from the owner of the building by reason of the terms of the contract.

Second. In allowing interest from July 7, 1916, on the damages found, for the reason that, the claim for such being in the nature of unliquidated damages, interest was not a proper charge upon the same.

Third. That by the contract between the parties, particularly articles VIII and XXIII, above quoted, the parties had provided in effect that as between them the remedy plaintiff might have for any delay caused to plaintiff in its carrying on the work was limited solely to an extension of time to be given to plaintiff for its completion of the work beyond the time stipulated in the contract equal to the length of time it was so delayed, and by necessary implication excluding any monetary allowance.

Fourth. In permitting the jury to consider improper elements of damages, if any such were to be allowed, in arriving at their verdict, including (a) rental value of plaintiff's plant during such periods of delay; (b) the value of the services of Mr. Gillen, the president and general manager, and Mr. Harrington, the secretary of the plaintiff.

We are satisfied the lower court took the proper view of the stipulation in holding that the purpose and intent was to withdraw, so far as the trial of the case was concerned, any question as to the amount of the items therein included, and to dispense with the necessity of proof being offered by either party on the trial with reference thereto, and that when the trial as to the disputed items was ended and ripe for judgment upon them there then should be included in any judgment the agreed sum of $8,275. The trial court was also right in holding that interest should be allowed by the language of the stipulation itself, and from June 1, 1917.

This stipulated amount was the sum of three of the items, together with some accrued interest, in plaintiff's two causes of action. Defendant executed its voucher therefor and took a receipt from plaintiff as a release for such claims. All this was therefore, by virtue of such stipulation and by the portion of the amended answer quoted above, an admission

and not a denial of liability. It was a present liability and payable presently. *Douglas v. Vorpahl,* 167 Wis. 244, 166 N. W. 833. It could not be controlled as to time of payment by the provisions of the contract relied upon by the defendant, first, because it did not say so, and secondly, because it was an unqualified admission as to an obligation payable in money, while the provision in the contract relied upon provided for the payments to be partly in money and partly in stock of the corporation owner of the building, and it therefore took itself out from the contract.

We are satisfied also that the court below ruled correctly in allowing interest upon whatever sum is properly to be found as the amount of damages for the claim of delay.

While the earlier authorities in this court, which alone are relied upon by appellant, drew the line somewhat strictly as to the allowance of interest in such class of cases where recovery was sought for unliquidated damages, the rule has been extended in later years so as to permit, in cases involving a claim for damages arising from breach of a contract and where the amount cannot be ascertained from the contract itself and requires the consideration of evidence before it can be assessed, a sum to be allowed equal to interest at the statutory rate from the time when the breach occurred, rather as an additional penalty and to more nearly make the injured party whole for the use of the money which has been thus determined to have been withheld from him, than as interest in the ordinary acceptation of the term. Such has been the repeated holding of this court. *Gross v. Heckert,* 120 Wis. 314, 330, 97 N. W. 952; *Bagnall v. Milwaukee,* 156 Wis. 642, 146 N. W. 791; *Voigt v. Milwaukee Co.* 158 Wis. 666, 149 N. W. 392; *Peters v. Nat. S. Co.* 167 Wis. 131, 163, 166 N. W. 43.

Under the third point presented by defendant, namely, that by the terms of the contract itself monetary damages for any delay were by implication excluded, it urges that under article XXIII, above quoted, giving the general con-

tractor the right at any time to suspend the whole or any part of the work without compensation to the subcontractor other than extending the time for completing the work to an equal period, there was in effect such suspension of the work rather than a delay. That it was so considered by the plaintiff is urged by reason of negotiations between the parties at the end of March, pursuant to which plaintiff wrote a letter of confirmation to the effect that plaintiff was to take one of its pile-drivers out of this foundation entirely; it was then to begin driving with its other one and finish a certain portion of the area left outside the Birchard Block; then to proceed in another portion of the area where the excavator was then working, and that as soon as the Birchard Block was razed and the excavating completed, to proceed with the area covered by that block. It further recited that this arrangement is made on plaintiff's part to help overcome the decided delays and extensive expense that it had been subjected to on this site.

No reference, however, was made at any time by either of the parties to this being considered in any way the exercise of any right by the defendant under this particular clause. Neither was it apparently so considered at any time during the trial, nor were any requests made to the court to submit any question possibly arising under this particular clause to the jury, nor was it specified in the motions made by defendant for a nonsuit or directed verdict. There is not sufficient in this letter nor in the testimony to warrant the court on this appeal to now say that there was such an exercise of any power or right given to the defendant under this particular clause, or any such recognition by plaintiff of any such power, that the question of the liability of defendant for the delays in question can be now so determined.

Defendant further urges that by the provisions of article VIII, considered in connection with the provisions in article VII for the payment of $100 for each day's delay as liquidated damages, and the following undisputed facts, it

must be now held as a matter of law that the allowance of additional time for the completion by plaintiff of its part of the work was the sole remedy for the delays:

By a letter written February 11, 1916, when the plaintiff had been unable to start as yet with the pile-driving, although under the contract it was required to have finished the west half of the required area by the 31st of January, it refers to this clause for $100 per day and asks that the same be annulled. No written answer was made to this request, although one of the defendant's officers testified that an oral consent to such an annulment was given, and the defendant appears to have never made any claim as against the plaintiff by reason of such clause.

Again, on March 25, 1916, plaintiff wrote to defendant speaking of the many delays which have prevented it going ahead with the work, and further saying:

"We know they are all well understood by you, and we know that you have made due allowance therefor in considering the time when the work should be finally completed; . . . but we are now in a position where we are obliged to claim further loss of time for reasons that are entirely avoidable."

The letter then speaks of the delay caused by the concrete contractor in starting a concrete elevator and mixer upon the site, so obstructing them in their work that they have to stop their pile-driving, and closed by saying:

"We regard the obstructing and hindering of our work in this manner not only as a good and sufficient excuse for extending the time within which our work should be completed, but as a distinct loss and damage to our company, and, as stated, we hope you will take advantage of your written agreement with the subcontractor to stop it."

All this, however, is insufficient, in our judgment, to support such contention.

Neither can we say that there is any such conclusive effect from the language of these provisions in the contract, par-

ticularly the language, so much relied upon by defendant, in article VII to the effect that in the event the subcontractor be obstructed or delayed by the neglect or delay of any other contractor there shall be an allowance of additional time to him for the completion of the work beyond the specified time. Several cases are cited by appellant which it claims sustain its position on this point, but no good purpose would be served by discussing them and pointing out the distinctions that exist between the language of the contracts therein involved and the present one. The present contract neither expressly assumes liability by the general contractor for delays caused by it, nor does it expressly exclude its liability for monetary damages for delays caused by it, and does not expressly provide for such a situation as has here arisen.

The general rule therefore applies, that where labor and material are to be furnished and rendered by the one party and to be paid for by the other, and the one furnishing the work, labor, or material is dependent to some extent upon the other party performing his part or providing for the prompt performance by others of a portion of the work, there arises by implication an obligation on such person situated as is the defendant here, not only to refrain from doing that which will interfere or impede the contractor in the performance of his part, but that it will also do all that which is reasonably necessary in order to enable the contracting party to so perform. For a failure in either respect damages can properly be awarded to the person so delayed or impeded. *Loehr v. Dickson,* 141 Wis. 332, 336, 124 N. W. 293; *Manistee I. Works v. Shores L. Co.* 92 Wis. 21, 28, 65 N. W. 863.

This was the rule adopted by the trial court in his charge to the jury.

It is true that under the contract here in question the defendant did not become a guarantor for the prompt and faithful performance by other subcontractors of their respective subcontracts, and mere proof of such failure or neg-

lect by such other subcontractor would not be sufficient of itself to place the burden upon the defendant of proving that it was free from fault in connection with delay or damage. This was also recognized by the trial court in charging the jury that they must find, in order to answer the questions as they did, that there was some direct interference by defendant or failure to do that which it could reasonably be expected to do under the circumstances to see that there was no interference by other subcontractors with the plaintiff's progress. While in this case there was much evidence of delay and apparently inexcusable neglect on the part of the other subcontractors by which the progress of the work was delayed, yet at no time during the progress of the trial did the defendant request the court to separate and exclude from the consideration of the jury such particular delays which might properly be traceable to the faults of such other subcontractors, rather than that which was directly caused by the defendant itself. Defendant relied all the way through the trial upon its broad claim, and upon which it elected to stand both in the court below and here, that no damages whatsoever for any delay could be recoverable, because of the provisions of the contract above quoted. No attempt was made to single out and separate the delay that was caused by reason of the injunctional proceedings preventing the wrecking and the excavating after wrecking of the Birchard Block on the northeast corner. Possibly, if such question had been so raised and presented to the court, it might have excluded from the consideration of the jury as an element of damages some at least of the time during which the work was so prevented from progress, there being no evidence in the record from which it could be held that the defendant was negligent in any way in looking after such proceedings or was responsible for the same.

Again, there were some delays to the work on account of the site being flooded at times, particularly for a certain period owing to a flood in the Milwaukee river, and still no

attempt by defendant to have such period or periods segregated from the rest.

There can be no question, however, but that, for the period at least of ten to fourteen days during which pile-driving was stopped by reason of the defendant insisting that the obligation was upon the plaintiff and not upon itself or some other subcontractor to remove the foundation walls of the building at the southeast corner of the site, there was a plain breach of the obligation of defendant toward plaintiff. For such period it could properly be chargeable with the consequent delay by its assuming to insist upon a position that was not warranted under its contract.

In any view of the case, therefore, there were some periods of delay during the continuation of the work when defendant should properly and beyond question be held chargeable for damages caused thereby to the plaintiff, and the record here presented makes it impossible for us to now carve out from this general finding as to the amount of damages such periods of time as might have been excluded.

The fourth and last proposition urged by the plaintiff on this appeal is that improper elements of damage were allowed to be considered by the jury. This includes rental value of plaintiff's plant during the periods of delay, and the value of the services of Mr. Gillen, the president, and Mr. Harrington, the secretary.

Plaintiff's secretary, Harrington, testified over objections that on account of the delay about three and one-half months' extra time was required of the services of Mr. Gillen, president and general manager, and of himself, and that such extra times were reasonably worth $2,049 and $983.57, respectively, aggregating $3,032.57.

The plaintiff is a going concern, with other work being undertaken and executed by it during the same period in which it was doing this work and without having employed or retained the services of either Mr. Gillen or Mr. Harrington particularly with reference to this contract, and, not hav-

ing actually paid them any more during that year than it would have otherwise, ought not to have such items considered in the nature of such special damages as could be charged against the defendant.

Express exceptions were also taken to the portions of the charge authorizing the jury to consider these substantial items, and it was prejudicial error to disregard such objections and exceptions.

As to the other elements of damage, the jury were permitted to consider the reasonable rental value of the equipment of the plaintiff for the period during which its use was interrupted, so far as this particular job was concerned, by the delays claimed to have been caused by defendant. Estimates were received as to what was the reasonable rental value of such equipment, consisting of scows, pile-drivers, and a tug, and computations were made from such estimated daily rental value of the various items of such equipment for the period from the 14th day of February, 1916, when the contract should have been completed, up to and including July 7th, when the last pile was driven, but crediting the defendant with the time when the equipment was actually used on such job as well as for such time as it was used on other work undertaken and carried on by plaintiff during the same period. It is now and for the first time urged by defendant that as to a portion of the time considered in the estimate as to the rental value of one or more of the scows used by plaintiff in loading, handling, and unloading the piles, such scows could not, under the testimony, be considered so in the service of the plaintiff with reference to this particular contract as to be considered a proper element of damage. This might well have been a proper objection on the trial, but we cannot now pick out particular portions of such elements some parts of which were proper, where no attempt was made to so pick them out on the trial.

We regret that the record on the question of damages is such that we cannot now finally dispose of this case.

On September 30, 1916, the plaintiff presented to defendant its claim for final payment for the balance under the contract for extras for the work done. In this application was the following: "Damages caused by delay to our work by your failure to have premises ready for us to proceed at time agreed, $2,500."

The account between the parties not having been settled, the following December the plaintiff took up with the architects of the building the question of the dispute between the parties hereto, and at that time, by letter of December 4th, they withdrew the item of $2,500 above mentioned and stating in effect that they had had an accurate auditing and account made and thereby determined that the amount of such damages for delay was greatly in excess of the $2,500 and amounted to over $16,000.

It appears that what was in the nature of a bill of particulars as to these items was, pursuant to some agreement between the respective counsel, furnished by plaintiff and referred to at various times during the trial, and it apparently contained a large number of items making up this $16,000. Such bill of particulars was not made a part of the record before us; and it has been a difficult matter to ascertain the particular items and amounts thereof which were before the jury in arriving at the amount of damages assessed by the latter at $7,713. The items, however, as can be picked out from the record as being before the jury, were about as follows:

Actual labor costs	$6,746 25
Computed cost at time of entering contract at so much per lineal foot piling	4,118 00
Difference claimed as excess cost	$2,628 25
Extra time of Mr. Gillen and Mr. Harrington	3,032 57
Extra liability insurance	141 00
Extra expense of operation of steam launch	350 00
Extra fuel	215 00
Cost for additional lines used on drivers	350 00
For towing defendant over, tugs	74 00
	$6,790 82

At the maximum prices as testified to by the witnesses, the rental value of the respective items of the equipment, estimating the rental value of the tug as including the crew, would total in round numbers $13,000, and at the minimum prices $8,300, making the totals of these and the above items between $15,000 and $20,000.

In these respective periods there was given separately the number of Sundays included. The rental value of the equipment for these included Sundays would be at the maximum prices about $2,500 and at the minimum prices about $1,800.

No suggestion was made in the charge nor request to so charge made, that such Sundays should not be included in the period for which damages were claimed, under the rule in *Raynor v. Valentin Blatz B. Co.* 100 Wis. 414, 76 N. W. 343, or in *Sentinel Co. v. A. D. Meiselbach M. W. Co.* 144 Wis. 224, 128 N. W. 861, where the court took judicial notice of the items there involved done on Sundays and held that no recovery could be had thereon, and we cannot, therefore, assume that such items were disregarded by the jury. Although the damages at less than one half of the above minimum were assessed, yet from the nature and the prominence given to the item of over $3,000 for the estimated value of the services of Mr. Gillen and Mr. Harrington by the rulings on the trial and by the charge, we cannot but feel that a substantial error was committed, and we cannot assume that such an item had been discarded by the jury in its computation.

We assume that the motion for judgment made upon the stipulation fixing the amount of claims at $8,275 was made under sec. 2892, Stats., although no reference to such statute is made in the briefs or in the record. In view of the construction we are now giving to the stipulation and its effect, we think the court may order the defendant to satisfy that part of the claim and might enforce such order as it enforces a judgment or provisional remedy.

We see no just reason why the defendant should delay

the payment of such amount while litigating the question of damages, and the trial court may therefore, when this record is remanded and upon application of plaintiff, so direct the defendant to satisfy the claim to the amount stipulated of $8,275, with interest thereon from June 1, 1917, so that payment of such admitted and just amount may be made forthwith in case further litigation is necessary.

We deem it proper to give the plaintiff the option of reducing the damages as found by the jury by the sum of $3,032.57, with interest on such reduced sum from July 7, 1916; otherwise a new trial to be granted upon the question of damages.

By the Court.—Judgment reversed, with directions to the court below to permit plaintiff to take a judgment wherein the damages as found by the jury shall be reduced to the sum of $4,680.43, with interest on such sum from July 7, 1916, and with the other items of such judgment as before, or, in case of the failure of plaintiff to exercise such option, then that a new trial shall be granted upon the question of damages; in the event of a new trial the plaintiff be permitted to have an order requiring the payment forthwith of $8,275, with interest thereon from June 1, 1917; appellant to have costs on this appeal.

On May 27, 1919, the court granted a motion by respondent for a rehearing and ordered a reargument on the following questions:

(1) Under the evidence before the court, is plaintiff entitled to recover for the services of Gillen and Harrington during the periods of delay?

(2) If not, what (if any) additional circumstances are there which might be brought out on another trial which would warrant such a recovery?

The following opinion was filed November 4, 1919:

PER CURIAM. Upon the rehearing in this case the court is of the opinion that the questions presented on this appeal

were rightly decided. It is a conceded fact, however, that since the entry of the original judgment in the court below the defendant company has gone into bankruptcy. For that reason and on the application of appellant to that effect, it is ordered that the mandate of this court be modified so as to read as follows:

Plaintiff is permitted to file in this court, within twenty days from this date, its election to reduce the damages as found by the jury by the sum of $3,032.57, and that thereupon the judgment as then so modified be affirmed; in the event of failure to so elect, the judgment will be reversed and a new trial granted on the question of damages, and in such event the plaintiff be permitted to have an order requiring the payment forthwith of the sum of $8,275 with interest thereon from June 1, 1917. Appellant to have costs on the appeal and on the motion for a rehearing.

On December 2, 1919, the court directed entry of the following:

The plaintiff having elected to consent to the modification of the judgment herein by reducing the damages found by the jury by the sum of $3,032.57, and such election having been filed in this court:

It is adjudged that the judgment be modified by reducing the same from $17,391.08 to $14,036.08, as of April 15, 1918, and as so modified be affirmed, appellant to have costs on this appeal and on the motion for rehearing.

BROWN and wife, Respondents, vs. WISCONSIN-MINNESOTA LIGHT & POWER COMPANY, Appellant.

October 8—December 2, 1919.

Electricity: Transmission line: Right-of-way contract: Warranty deed with restrictions: Right to trim trees: Eminent domain: Remedy of owner for cutting trees: Measure of damages.

1. Where a contract for the sale of a fifty-foot strip of farm land to a power company provided that no towers were to be placed in front of the seller's dwelling house, that the land was to be used as a right of way for transmission lines, and that trees should be trimmed so as not to interfere with the lines, such restrictions on the use of the land, being reasonable and valid as not inconsistent with public interest or public policy, did not prevent the title conveyed from being a fee or turn it into a mere easement, the contract calling for a warranty deed of the land free and clear of all incumbrances.
2. The restriction in the contract that trees should be trimmed "so as not to interfere with the lines," is *held* not to apply only to trees outside of the fifty-foot strip, there being but four of these on the owner's premises to which the language could possibly refer, while there were more than one hundred on the strip conveyed.
3. Where the landowner never consented to the cutting down of the trees, but vigorously objected, the principle that one who expressly or tacitly consents to the occupation of his land by a public utility cannot sue for trespass but must condemn, does not apply.
4. The evidence establishing that a clearance of ten feet is necessary to prevent electricity from leaping from the wires to tree branches, the company had a right, under the clause permitting it to trim the trees so as not to "interfere" with its lines, to trim them so that no branch was within ten feet of the nearest line.
5. The damage to the owner from the company's acts in cutting trees in excess of what was necessary is the difference between the value of the farm with the trees trimmed in the manner provided by the contract and its value with the trees cut down.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

Trespass. Plaintiffs are husband and wife and own a farm of 240 acres in St. Croix county bounded on the north by an east-and-west highway. Their dwelling house and other buildings stood about four rods south of the highway. July 27, 1915, the plaintiffs made a written contract with the defendant (a public utility corporation operating an electric power transmission line) by which, in consideration of $1 then paid and $525 to be paid on the execution of a deed, they agreed to sell to defendant at its option within two years, "free and clear of all incumbrances, a strip of land fifty feet in width over and across" their said farm (describing it), said strip being immediately south of the south line of said highway. The agreement further provided that "said company shall permit the grantors, their heirs and assigns, . . . to use the said property hereby agreed to be conveyed for their own purposes without payment of rent so long as the said uses by the said grantors do not interfere with any present or future uses which the said company, its successors or assigns, may desire to make of the premises to be conveyed. No towers to be placed in front of the dwelling, trees to be trimmed so as not to interfere with lines. Said land to be used for the right of way or for electric transmission lines." The agreement also provided for the execution and delivery of a good and sufficient warranty deed of the strip to the defendant, in payment of the agreed consideration, acknowledging full settlement of all claims for damages sustained by reason of the construction and maintenance of the power lines on the premises, "and said company shall have the right in the meantime to enter upon said land and construct its transmission lines thereon. Said deed shall provide that said consideration is in full payment for all damages caused by the cutting of timber on all lands owned by us which may be found necessary in order to leave the said lines safe from falling timber."

The evidence shows that immediately in front of the plaintiffs' dwelling house and within the fifty-foot strip

there were twenty-seven soft maple and box elder trees, to the east of these trees and in the highway along the north side of the fifty-foot strip were twenty-nine box elder and elm trees, while to the west and in the highway along the north side of the said strip were fifty-two trees in a double row. The trees were young trees thirty or thirty-five feet in height and were for windbreak and shade. It was admitted that before cutting any trees the defendant tendered full payment as provided by the contract. In the summer of 1916 the defendant took possession of the fifty-foot strip and, against plaintiffs' vigorous protest, cut down all the trees in the fifty-foot strip and in the highway along the north line of the strip. This action was brought to recover damages for the cutting down of the said trees, it being contended by the plaintiffs that the defendant only purchased a right of way over the fifty-foot strip, with permission to trim the trees on the strip and along the highway adjacent to the strip so as not to interfere with the wires, but with no right to cut them down. The trial court held as matter of law that the plaintiffs were entitled to recover, and the jury decided by special verdict (1) that the fair market value of the plaintiffs' farm immediately before the cutting of the trees, taking into consideration the existence of the contract, was $28,000; (2) that defendant did more trimming and cutting of trees on the strip and the highway adjoining than was necessary to prevent interference with the transmission lines and leave them safe from falling timber; (3) that the fair market value of the farm immediately after the cutting of the trees, taking into consideration the existence of the contract, was $24,500; (4) that the plaintiffs suffered special damage by the cutting of the trees not included in the diminution in value of the farm amounting to $250. Upon this verdict judgment was rendered for the plaintiffs for $3,500 and costs, and the defendant appeals.

Spencer Haven of Hudson and *G. O. Linderman* of Eau Claire, for the appellant.

For the respondents there was a brief by *Varnum & Kirk* of Hudson and *McNally & Doar* of New Richmond, and oral argument by *W. F. McNally, W. T. Doar,* and *N. O. Varnum.*

WINSLOW, C. J. The contract in question called for the conveyance of a fee title to the strip in no uncertain terms. It called for a warranty deed of the land free and clear of all incumbrances, and that means but one thing. True, there were to be certain restrictions on the use of the land, but these do not prevent the title from being a fee or turn it into a mere easement. *Polebitzke v. John Week L. Co.* 157 Wis. 377, 147 N. W. 703. They are not inconsistent with a fee title: they simply restrict the use of the premises within certain limits. When such restrictions are reasonable and not inconsistent with public interest or public policy they are valid. 13 Cyc. 713 *et seq.;* 8 Ruling Case Law, p. 1115, § 177. In the present case it is very apparent that the provisions that no towers are to be placed in front of the dwelling house and that the land is to be used as a right of way for transmission lines are reasonable restrictions upon the use of the land, and we think the provision with regard to the trimming of trees was intended by the parties as also such a restriction, and it certainly is not unreasonable. It is hardly to be imagined that the plaintiffs would deliberately surrender the whole front of their estate, covered as it was with shade trees which they themselves had planted and nurtured, to the woodman's ax without any restriction or qualification. They unquestionably desired to retain the trees as far as was consistent with the operation of the electric transmission wires, and this desire was expressed in the words, "trees to be trimmed so as not to interfere with the lines."

The idea is quite clear though the words used do not with technical correctness describe the restrictive covenant or condition which is to be inserted in the deed.

The argument that this language applies only to trees outside of the fifty-foot strip does not seem sound or convincing. There were but four trees on the plaintiffs' premises outside of the strip and the street adjacent thereto which the language could possibly refer to. It is not reasonable to suppose that the plaintiffs took such pains to preserve these few trees as the provisions of the contract indicate and turned over more than a hundred others to the defendant to do as it pleased with them without restriction.

Nor can we agree with the contention of the appellant that condemnation is the plaintiffs' only remedy under the principle announced in *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515, 21 N. W. 623, and followed ever since that time (*Cronin v. Janesville T. Co.* 163 Wis. 436, 158 N. W. 254), namely, that when one has expressly or tacitly consented to the occupation of his land for railway purposes he cannot bring an action for trespass but must condemn.

There was never any consent given here to the cutting down of these trees; on the contrary, there was vigorous objection from the very beginning. We cannot regard the consent which was given to use the premises in a certain restricted way as enabling the defendant to enter and do what it pleased regardless of the restriction to which it had agreed. It could thus accomplish by strategem what it could not accomplish by fair and open dealing. If, as is claimed, it would be difficult to build the transmission line without cutting down the trees, that is something that should have been thought of before the contract was made.

It seems to be clearly established by the evidence that a clearance of ten feet is necessary in order to prevent the electric current from leaping from the transmission wire to a branch. The defendant had the right under its contract to trim the trees so as not to "interfere" with its lines. This must be held to mean, under the evidence as given on the trial, that no branch should be left within ten feet of the nearest line, not merely that no branch should physically

touch a line. If a branch be near enough so that the current will leap to it from the wire, that clearly constitutes an interference.

The result is that there must be a new trial because of the application of a wrong rule of damages. The damages consist of the difference between the value of the farm with the trees trimmed in the manner provided by the contract and its value with the trees cut down.

By the Court.—Judgment reversed, and action remanded for a new trial.

BELLE CITY MALLEABLE IRON COMPANY and another, Appellants, vs. ROWLAND, Guardian, and another, Respondents.

November 4—December 2, 1919.

Workmen's compensation: "Performing service growing out of and incidental to his employment:" Instructions to servant to prevent destruction of property by fire unnecessary: Evidence as to employee and wife living together: Presumption of dependency.

1. Where a millwright in charge of the pattern department of an iron company, who had remained in the plant checking patterns after other employees had ceased work, observed a fire as he was leaving and entered a burning building where he lost his life, there is a reasonable inference that he entered the building either to look after valuable patterns or to save his employer's property; and, neither act requiring specific instructions from a superior, the conclusion of the industrial commission that at the time of his death he was performing service growing out of and incidental to his employment, within the meaning of sub. (2), sec. 2394—3, Stats., is sustained.
2. In a proceeding to recover for the death of such employee, the evidence is *held* to show that his widow, whose mind had been impaired for years and who had spent much time in various hospitals but was living temporarily with a son in another city when her husband was killed, was living with her husband at the time of his death within the meaning of sub. 3 (a), sec. 2394—10, Stats.

3. A proper finding that decedent's widow was living with her husband at the time of his death establishes a conclusive presumption that she was solely and wholly dependent upon him for support, in view of sub. 3 (a), sec. 2394—10, notwithstanding she had property and an income of her own sufficient for her support.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

An award was made by the *Industrial Commission of Wisconsin* to the defendant *John D. Rowland* as guardian of Marie J. Hansen, an incompetent person, of the sum of $2,907.24 as compensation by reason of the death of Louis Hansen, husband of said Marie J. Hansen, against the plaintiff *Belle City Malleable Iron Company* as employer and the *Wisconsin Mutual Liability Company* as insurer.

The deceased for a long period of years had been employed by the plaintiff employer as millwright and foreman of the pattern department. He had charge and supervision of the patterns used by the employer in its work. His duties required him to be at the plant of the plaintiff employer not only during the customary working hours but at other times. On Saturday, January 5, 1918, the plant shut down as usual, so far as the rest of the employees were concerned, at noon, but Hansen was in the premises during all of the afternoon engaged in checking over the patterns and working with an inspector from out of town. This work ceased at 5 o'clock and the deceased then started for home. Just as he was leaving the plant and at about five minutes past 5 it was discovered that fire had broken out in the basement of one of the buildings of plaintiff. Deceased immediately turned back, requested another employee to get a pail of water to assist him in putting out the fire, and was last seen just outside one of the buildings. His body was discovered on the following Wednesday morning in the basement of one of the destroyed buildings, some seventy-five feet away from the part of the plant in which the pattern department was located.

Deceased and applicant were married in January, 1900. In 1913 she had a serious operation, and her physical and mental health was substantially impaired from that time. She suffered from delusions and at times was very violent. In the fall of 1913 she went to a sanitarium at Oconomowoc, Wisconsin, returned to Racine about February, 1914, and lived with deceased until the following November, when, after making a trip to California, she returned to the sanitarium, remaining there until May, 1915. In January, 1915, on application of her husband, a guardian was appointed for her property. In July, 1915, she returned to the sanitarium, remaining there until September. From that date until November, 1916, she lived with her husband. She then went as a voluntary patient to the state hospital at Mendota, from there to Waukegan, Illinois, and in January, 1917, again to the sanitarium at Oconomowoc, remaining there until May. In the summer or fall of 1917 she went to Chicago and kept house for her adult son by a former marriage in a three-room flat furnished by him. She did not live in the same house with her husband at any time after September, 1916. She had consulted an attorney concerning the bringing of a divorce action in 1914 or 1915, but none was started.

At the time of her marriage in 1900 she had some property of her own. The earnings of her husband from that time on were kept subject to the control and disposition of the two jointly. The homestead, a good-sized house of eight to ten rooms in Racine, was in her name and worth from $4,000 to $5,000. She had invested in interest-bearing securities about $15,000. The income from such investments, together with small amounts of the principal at times, were used for her care, and the deceased advanced but slight amounts during the last two years of his life for her support, but appears to have paid for the expenses of her trip to California. No call appears to have been made upon him by her or her guardian for funds during this period, at least none to which he failed to respond.

In her own testimony before the *Commission* she said in substance, among other things: "We were very happy together. He was a good man; he always used to provide for me. I agreed with him to live in Chicago with my son until I got well. My staying in Chicago was a sort of visit with my son." Shortly before the death she told her son of her intention of going back to her husband. From the testimony of the son as well as others, it appears that at times she expressed herself as not wanting to live with her husband and at other times as desirous of doing so.

The *Commission* found that applicant was living with Louis Hansen at the time of his death within the meaning of sub. 3 (a), sec. 2394—10, Stats., and therefore entitled to a death benefit.

The plaintiff employer and insurer brought this action in the circuit court for Dane county to review the determination of the *Commission* in such award, and from the judgment of the circuit court affirming such award this appeal is taken.

For the appellants there was a brief by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* of counsel, and oral argument by *Ida E. Luick,* all of Milwaukee.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ESCHWEILER, J. The appellants contend on this appeal, first, that Hansen was not within the course of his employment in entering the burning building where he met his death; second, that the applicant, Marie J. Hansen, was not living with her husband at the time of his death within the provisions of sub. 3 (a), sec. 2394—10, Stats.; and lastly, that she was not a dependent upon him within the meaning of the same statute.

We are satisfied that the evidence supports the conclusion of the *Commission* that at the time of his death Louis Han-

sen was performing service growing out of and incidental to his employment within the meaning of sub. (2), sec. 2394—3, Stats. He must have entered the building voluntarily and knowing the possibility of danger in so doing from its being then on fire. But it is a reasonable inference that he did so for either one or both of these purposes: (1) under the specific duty devolving upon him to have charge of and look after the valuable patterns essential for the work being done by his employer; (2) from the sense of obligation to use a reasonable amount of care to save his employer's property at a time of such emergency. As to each of these it needed no specific instructions from any superior to perform such services or voluntarily assume such responsibility while making an effort within the field of reasonable care to save the property of his employer. While so doing he cannot be considered, as a matter of law, to be a stranger. *McPhee's Case,* 222 Mass. 1, 4, 109 N. E. 633; *Munn v. Industrial Board,* 274 Ill. 70, 113 N. E. 110.

We do not think that either the letter or the spirit of the workmen's compensation act requires that such employee should be penalized for obeying such a natural and commendable instinct on his part.

On the third point urged by appellants, we hold that under the testimony of Mrs. Hansen to the effect that she was living with her son only temporarily rather than with her husband and by reason of an agreement between the deceased and herself on account of her ill health, and that the work required in the apartment furnished by the son was much less of a strain upon her than at the homestead, and that she expected to return to her husband, all furnish ample warrant for the finding that she was living with her husband at the time of his death. *Northwestern Iron Co. v. Industrial Comm.* 154 Wis. 97, 101, 142 N. W. 271.

Having properly held that she was living with her husband at the time of his death, then sub. 3 (a), sec. 2394—10, Stats., establishes a conclusive presumption that she was

solely and wholly dependent upon him for support. That she had property of her own, even were the income therefrom sufficient and for a time actually had been alone used for her support, would be entirely immaterial.

By the Court.—Judgment affirmed.

NEIL & COMPANY, INC., Respondent, vs. WISCONSIN TELEPHONE COMPANY and another, Appellants, and UNITED STATES NATIONAL BANK, Appellant and Respondent.

November 4—December 2, 1919.

Mechanics' liens: Sufficiency of letter as notice of lien: Service of notice in another county: Priorities in fund due from owner to contractor: Rights of contractor's surety and his assignee: Liability of contractor's surety for costs.

1. Where the last labor and material for the erection and construction of a building were furnished by a subcontractor within sixty days of September 19th, when the subcontractor by its attorney sent a letter to the person who, as attorney and agent, represented the owner and the contractor's surety, which letter, though lacking the usual formality of a notice of lien and containing some immaterial matters, nevertheless stated the amount due the subcontractor for work, labor, and materials furnished, and claimed a lien, such letter was also such a notice as was required by sec. 3315, Stats. 1913.
2. The notice of claim of a mechanic's lien required by said sec. 3315 may be served on the owner or his agent in a county other than that in which the property is located, and need not, if service cannot be made in such county, be filed in the office of the clerk of the circuit court of the county.
3. A subcontractor on a building which has perfected its lien for work, labor, and material, the greater part having been furnished before the date of the contractor's assignment to a bank of funds or payments due from the owner, has a prior and superior right to payment from such funds over that of the bank.
4. In the subcontractor's action to foreclose its lien against the contractor, owner, and the contractor's surety as defendants, wherein a bank was interpleaded as assignee of the money due the contractor, and other creditors of the contractor intervened, judgment in favor of the assignee bank to recover

the balance of the money due the contractor from the owner, after deducting the amount of the judgment for the plaintiff subcontractor, is proper under the circumstances of the case.

5. A contractor's surety which has no claim for moneys previously paid by it on account of its liability as surety to release any lien on the owner's property or for any claims paid by it, and there being no other mechanics' liens constituting a superior and prior claim to that of a bank as creditor of the contractor on the funds received on the building contract, has no superior equitable right over that of the bank, assignee from the contractor of moneys due, to the amount due the contractor from the owner.

6. In the subcontractor's action to foreclose its mechanic's lien, the contractor's surety, made a defendant, is not entitled to be reimbursed for the costs, disbursements, and attorneys' fees it has incurred in litigating the issues, standing in such respect in the place of the owner, which, had it undertaken to litigate the issues, would have been liable for costs where the subcontractor and the contractor's assignee, which interpleaded, recovered.

APPEALS from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Affirmed on both appeals.*

This is an action to foreclose a mechanic's lien against property of the *Wisconsin Telephone Company* in which the *Equitable Surety Company,* as bondsman of the contractor, was made defendant, the *United States National Bank* was interpleaded as assignee of the money due the contractor, and the Higgins Manufacturing Company and other creditors of the contractor intervened to enforce payment of their claims out of the money due the contractor and claimed by the *United States National Bank* as assignee.

The complaint alleges, in substance, that Emil Sedlachek is a building contractor in the city of Superior, Douglas county, Wisconsin; that on May 10, 1915, the *Wisconsin Telephone Company* entered into a written contract with Emil Sedlachek as contractor to construct and to furnish all the work, labor, and materials necessary for the erection and construction of a three-story brick building on lots of the *Telephone Company* for the price agreed upon in said con-

tract; that A. C. Eschweiler of Milwaukee was named in the contract as the architect under whose supervision the work was to be done on the telephone building; that the contract provided that Emil Sedlachek might sublet portions of the work on the building, including the plumbing and heating plants shown in the plans and specifications; that Sedlachek, prior to June 1, 1915, commenced the erection and construction of the building and has since furnished all the work, labor, and material for construction of the building, partly, however, by means of subcontracts, and had entirely finished the building prior to the time of the filing of the mechanic's lien; that the building had been fully accepted by the owner, the *Wisconsin Telephone Company,* prior to the time of the filing of the mechanic's lien.

The complaint also alleges that before entering into the contract for the construction of the building Emil Sedlachek had furnished a bond as provided in the building contract for the faithful performance of his contract, which bond was signed by the defendant *Equitable Surety Company;* that on June 1, 1915, the plaintiff, *Neil & Company,* entered into a contract with Emil Sedlachek to furnish, as subcontractor. all the work, labor, and materials entering into the construction and installation of all the plumbing work and of the heating plant in the building for the consideration of $4,540; that this contract between Emil Sedlachek and the subcontractor, *Neil & Company,* was approved by the *Wisconsin Telephone Company* on June 14, 1915; that this plaintiff began the construction and installation of this plumbing work and heating plant on June 3, 1915; that it had completed its contract and its work had been approved by Emil Sedlachek and the *Wisconsin Telephone Company;* that plaintiff notified A. C. Eschweiler, the architect, and the *Wisconsin Telephone Company* that plaintiff had been employed as subcontractor to furnish the plumbing and heating of the building and that these notices were received by A. C. Eschweiler and the *Wisconsin Telephone Company* on or about June

30, 1915; that the work contracted for by plaintiff and some extra work were completed September 18, 1916; that the extra work amounted to $375.65 in value; that the total owing to plaintiff by Emil Sedlachek is the agreed price in the subcontract, $4,540, and the extra work $375.65, making a total of $4,915.65, of which sum Sedlachek has paid plaintiff $3,150, leaving a balance of $1,765.65 due him. The complaint adds that plaintiff filed his lien on September 30, 1916, within sixty days after the completion of his subcontract; that less than one year has elapsed since the doing of the last work on the subcontract; that on November 11, 1916, Sedlachek, together with defendant *Equitable Surety Company,* entered into a contract in writing with the defendant *Wisconsin Telephone Company* that the *Equitable Surety Company* would pay or cause to be paid all lawful indebtedness due or accruing thereafter from defendant Emil Sedlachek to subcontractors.

There is a balance of $4,907.65 due from the *Telephone Company* on the building contract, and this balance was turned over to and is now held by the *Surety Company.* The *United States National Bank* of Superior claims an assignment of this money executed by the contractor to secure loans made to him by the *Bank* to finance the building contract, and that there is a balance of $4,604.25 due the *Bank,* payment of which is claimed out of this money held by the *Surety Company.* Upon petition of the *Surety Company* the *Bank* was interpleaded as a defendant. The *Bank* denies plaintiff's right to a lien or to the money due from the *Telephone Company,* and by counterclaim pleads the assignment of this money and asks for judgment to recover this fund as assignee of the contractor, and against the *Surety Company* for money had and received for the use of the *Bank.*

Higgins Manufacturing Company, Dahlstrom Metallic Door Company, Paine & Nixon Company, Baxter Sash & Door Company, and John E. Eldred, Jr., intervened as defendants, claiming to be creditors of the contractor for ma-

terials furnished, and claimed that the *Surety Company* is liable upon its bonds for their claims, and sought to have satisfaction out of the money it had received from the *Telephone Company.*

G. H. Winsor, as trustee in bankruptcy of the contractor, also intervened and claimed the money due the contractor from the *Telephone Company.*

The trial court made findings and conclusions upon which judgment was entered giving plaintiff a lien against the premises for $2,065.81, including interest, and $122.40 costs, making a total of $2,188.21, and adjudged foreclosure of its lien. The court found that the contractor had assigned the money due on his building contract to the *Bank,* but gave the plaintiff a preference to such money over the *Bank,* and awarded judgment in favor of the *Bank* for recovery of the money paid by the *Telephone Company* to the *Surety Company* ($4,907.05), less the amount of plaintiff's judgment ($2,188.21), namely, for the amount of $2,718.84. The court also awarded judgment dismissing the claims of the other defendants as subcontractors and materialmen and the trustee in bankruptcy to any right or interest in the moneys due Sedlachek as contractor from the *Telephone Company.* The *Bank* recovered costs against the *Telephone Company* and *Surety Company,* taxed at $46.86. Defendant Sedlachek had obtained a discharge from his debts in a proceeding in bankruptcy, and no judgment was awarded against him.

The *Telephone* and *Surety Companies* and the *Bank* appeal from the whole of the judgment.

The cause was submitted for the plaintiff on the brief of *Dietrich & Dietrich* of Superior; for the defendants *Equitable Surety Company* and the *Wisconsin Telephone Company* on that of *Paul D. Durant* of Milwaukee; and for the defendant *United States National Bank* on the briefs of *H. V. Gard* of Superior.

SIEBECKER, J. The record discloses that none of the laborers and materialmen who are defendants and whose alleged rights to payment of their claims against the contractor, Sedlachek, out of the moneys held by the *Surety Company* from the *Telephone Company* have been disallowed by the judgment awarded, have appealed. Their right to payment out of the fund in the hands of the *Surety Company* is therefore finally denied by the judgment of the circuit court.

The issues, therefore, on this appeal are: (1) Did the trial court properly adjudge that plaintiff has established its subcontractor's lien for labor and material furnished in the erection of the telephone building and that it has a preferred claim for payment out of the fund held by the *Surety Company;* and (2) Has the *Surety Company* any claim to such fund superior to the claims of the *Bank?*

The trial court found that the sum of $1,765.65 remains due to plaintiff on its contract for the furnishing and installing of the plumbing and the heating plant in the erection of the *Telephone Company* building, and that plaintiff failed to give the ten-day notice, but gave the sixty-day notice to the *Telephone Company* as required by sec. 3315, Stats., to perfect its laborers' and materialmen's lien provided for in this section. The *Telephone* and *Surety Companies* do not assail these findings of the court, but the *Bank* insists that the court erred in so finding, for the reason that the evidence of notice of a claim of lien fails to establish the notice required by sec. 3315, Stats. 1913. This statute provides that such lien claimant, "within sixty days after performing such work or labor or furnishing such materials, . . . shall give notice in writing to the owner, or his agent, of the property to be affected by such lien, if to be found in the county, and if neither can be found therein, by filing such notice in the office of the clerk of the circuit court of such county," setting forth specifically the things enumerated in the statute. We consider that the evidence in the case sustains the trial

court in finding that Paul D. Durant represented the *Telephone Company* and the *Surety Company* from and after the 7th day of September, 1916, as attorney and agent in the negotiation and adjustment of the transactions arising out of the contract for the erection and completion of the *Telephone Company's* building. We are also persuaded that the court correctly found that the last labor and material was furnished within the month of August and within sixty days of the 19th of September, when plaintiff by its attorney sent a letter to Paul D. Durant at the city of Milwaukee setting forth the plaintiff's claim for a lien for the work and material furnished under its contract for the erection of the building and the amount unpaid thereon. Though this letter lacks the usual formality of such a notice and contains some immaterial matters, yet in substance it is a notice containing a statement of the amount due plaintiff as subcontractor for the work, labor, and material furnished under its contract for the erection of the telephone building and makes a claim for a lien on the premises.

It is strenuously asserted that the service on Durant as agent for the *Telephone Company* is not in compliance with the provisions of sec. 3315, Stats. 1913, requiring that such notice must be given "in writing to the owner, or his agent, . . . if to be found in the county, and if neither can be found therein, by filing such notice in the office of the clerk of the circuit court of such county." It is urged that it is necessary under these provisions that service of such notice on the owner or his agent must be made in the county where the property is located, and, if such service cannot be made in such county, then such notice must be filed in the office of the clerk of the circuit court of the county. This construction precludes service on the owner or his agent outside of the county where the property is located. This, we think, is too strict and narrow an interpretation of the statute. The language used does not necessarily import that service of such notice on the owner or his agent can only be made in

the county where the property is located, nor does it forbid service of such notice on either the owner or his agent anywhere in the state. It however gives the lien claimant the right to perfect his lien, if the owner or agent cannot be served in the county, by filing such notice in the office of the clerk of the circuit court. It follows from this that plaintiff had the right under this statute to serve a notice of claim of lien on Durant as the *Telephone Company's* agent, as found by the trial court.

The plaintiff having perfected its subcontractor's lien, there can be no controversy as to plaintiff's prior and superior right to payment over that of the *Bank* for the work, labor, and material furnished, the bulk whereof had been furnished prior to October 22, 1915, the date of the alleged assignment to the *Bank*.

It is contended by the *Surety Company* that the court erred in awarding judgment in the *Bank's* favor for the recovery of the balance of the $4,907.05 after deducting therefrom the amount of the plaintiff's judgment. There is no controversy but that defendant Sedlachek owes the *Bank* the sums as found by the court and that this debt is in excess of the balance of the fund the *Surety Company* received from the *Telephone Company* after deducting plaintiff's judgment. The *Bank* insists that it is entitled to such balance as the assignor of the fund and creditor of Sedlachek for moneys it advanced to him in conducting his building operations, including the construction of the telephone building. The *Surety Company* asserts a superior and prior equity over the *Bank* to this balance of the fund it so received from the *Telephone Company*. In determining this question it must be borne in mind that the record shows that there is no other subsisting lien on the telephone building in favor of the contractor or any other subcontractor or laborers and that all of the intervening defendants in this action except the *Bank* have not appealed from the judgment entered herein and hence they are not in a posi-

tion to assert a claim to this fund held by the *Surety Company.*

Upon this state of the case it follows that there is no creditor of Sedlachek who has a superior claim to the fund held by the *Surety Company* to that of the *Bank* as determined by the judgment appealed from. The *Surety Company* claims that it holds this money as a trust fund under the provisions of the statutes and the building contract of the *Telephone Company.* Such a trust fund is, however, conditioned on the event that the claimants thereto are persons entitled to a lien on the premises on which the building is erected and that the owner is liable for such claims. As heretofore indicated, no such lien claims are shown to exist. Nor does the record show that the *Surety Company* has any subsisting claim for moneys heretofore paid by it on account of its liability as surety to release any lien on the *Telephone Company's* property, or for any claims it has paid that constitute a superior and prior claim on the funds it received on the building contract to that of the *Bank* as creditor of Sedlachek. Under these facts it is not shown that it has a superior equitable right to this fund to those of the *Bank.* The claim that the *Surety Company* is entitled to be reimbursed for the costs, disbursements, and attorney's fees it paid and has incurred in litigating the issues in the instant case is not well founded. In this respect it stands in the place of the *Telephone Company.* Had the *Telephone Company* undertaken to litigate the issues raised by the pleadings there can be no question that it would have been liable for costs in the action in view of the recovery awarded the plaintiff and the *Bank.*

We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed on both appeals, the plaintiff to recover costs against the *Surety Company.* The appellant the *United States National Bank* is not to recover any costs in this court nor be liable for costs to the plaintiff or the *Surety Company.* The *Surety Company* to pay the clerk's fees.

SHEAFOR, Respondent, vs. STANDARD ACCIDENT INSURANCE COMPANY, Appellant.

November 4—December 2, 1919.

Insurance: Timely notice of accidental injury: Appeal: Admission of evidence after motions for directed verdict and discharge of jury.

1. Where the loss of an eye did not result within twenty days after an accident, and a physician after such time told insured that he could not then say that the injury was due to the accident, a notice to the insurer within twenty days after the insured was definitely told by the physician that the accident was the cause of the loss of the eye was a compliance with an accident policy requiring notice of injury to the insurer within twenty days from the date of the accident unless it was not "reasonably possible to give such notice."
2. In an action on an accident policy it was not error to allow plaintiff, after both parties had moved for a directed verdict and the jury had been discharged, to recall a physician, who upon re-examination of his records testified that he had been mistaken as to the date in his former testimony when he had informed plaintiff that the defective condition of his eye was caused by an accident, although the change of date had the effect of showing that plaintiff had given notice of the injury within the time required by the policy, where it was established as a verity that the physician was mistaken in his former evidence. The corrected evidence raising no issue of fact for the jury, the defendant was not prejudiced by its waiver of a jury trial.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action was brought upon an accident insurance policy issued by the defendant to recover damages arising out of an injury alleged to have been caused by the loss of an eye for which indemnity was claimed by plaintiff under the policy.

The case was here before on demurrer to the complaint. The demurrer was overruled. 166 Wis. 498, 166 N. W. 4. The defendant answered and the case was tried to the court and a jury. At the close of the evidence both parties.

without reservation, moved for a directed verdict, and the court, under sec. 2857*a*, Stats., discharged the jury.

After the jury was discharged the court permitted, against defendant's objection, the plaintiff to recall Dr. Dwight to change his testimony.

The court made the following findings and conclusions:

"(1) That the defendant is an accident insurance company, duly organized and existing under the laws of the state of Michigan, and duly licensed in this state to insure persons against loss resulting from bodily injuries, effected as stated and agreed in any policy of insurance issued by it to any person who, in order to be insured against any such loss, might pay it the stipulated premium for such insurance.

"(2) That on or about the 25th day of July, 1914, in consideration of the payment by the plaintiff to the defendant of the stipulated premium, the defendant made and delivered to the plaintiff its policy of accident insurance, partly printed and partly written, wherein it provided, as an indemnity to the plaintiff against any loss therein mentioned, the principal sum of $7,500, and more particularly, for the loss of the sight of one eye, one half of such sum, to wit, $3,750.

"(3) That at the times referred to in these findings the plaintiff was the principal of the high school and a resident of the city of Janesville, Wisconsin.

"(4) That on or about the 13th day of May, 1915, while in the line of his duty as such principal, the plaintiff met with a bodily injury through external, violent, and accidental means, which, proximately and directly, exclusively and independently of all other causes, eventually resulted in complete loss of sight in his left eye.

"(5) That up to the time of said accident plaintiff's eye and sight were natural and healthy and seemingly so continued for some little time after the accident; that for a long time after the accident plaintiff had no knowledge that any injury to the eye had resulted from the accident, and that the injury seemed to have been entirely external, trivial, and passing in character, not calling for medical treatment, and that in a short time all external evidence of the accident disappeared.

"(6) That, however, after the seemingly slight accident had been forgotten by the plaintiff, and about two weeks before the close of the school year on the 18th day of June, 1915, his left eye began to cause him inconvenience and pain; that this trouble gradually increased, so that on or about the 21st day of June, 1915, he called on Dr. Corydon G. Dwight of Madison, Wisconsin, an eye specialist, for counsel; that on the following day Dr. Dwight made an examination of plaintiff's eye, but was at that time unable to determine the nature of the injury; that the matter of an external injury being the cause was suggested by the doctor, and that plaintiff thereupon recalled the accident and informed Dr. Dwight of it, who informed him that he would have to treat and watch the progress of the injury before he could determine correctly its cause.

"(7) That plaintiff, immediately after said examination by and conversation with Dr. Dwight, personally called on J. P. Davies, the defendant's agent at Madison, who had written the policy of insurance, and informed him of the accident and of Dr. Dwight's examination and treatment of the eye, and of the latter's suggestion that he might eventually find that the accident was the producing cause but that he was as yet unable to determine that matter with any degree of certainty; that the plaintiff thereupon discussed with said Davies the advisability of giving notice of the accident and making claim for indemnity under his policy; that said Davies thereupon advised plaintiff that the information furnished to him as agent of the defendant would be sufficient notice under the policy to the defendant, and that plaintiff would lose no rights under his policy by withholding formal demand for indemnity while awaiting the final decision of Dr. Dwight as to the cause and extent of the injury to the eye.

"(8) That the plaintiff thereafter took continuous treatment from Dr. Dwight, and that Dr. Dwight finally, to wit, on the 31st day of July following, informed the plaintiff that the sight of his left eye was irretrievably lost and that such loss was due solely to the said accident which he had sustained.

"(9) That thereupon the plaintiff without delay, and as soon as it was reasonably possible to do so after the nature and cause of the injury was ascertained by him with any

degree of certainty, informed Mr. Davies of the situation; that the latter thereupon furnished him with printed forms to make formal proof of loss, which plaintiff executed and returned to said Davies as the authorized agent of the defendant, who either retained the same or forwarded the same to the home office of the defendant.

"(10) That said Davies, being supplied by the defendant with its printed forms for giving notice and making proof of loss to be furnished by him to its patrons as occasion might require, was a duly 'authorized agent of the company' within the provision of subdivision E of section 5 of the policy, notice to whom it is provided 'shall be deemed notice to the company.'

"Conclusions of Law.

"(1) That the plaintiff has conformed to all the requirements of the policy on his part to be performed and is entitled to recover the full indemnity provided for in the policy for the loss of the sight of his said left eye.

"(2) That the defendant is liable to the plaintiff in the sum of $3,750, that being the specific sum provided for in the policy as indemnity to the plaintiff for the loss of the sight of one of his eyes as a result of the accident which he suffered, together with interest thereon from the 3d day of February, 1916, that being the date on which this action was brought."

Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Lines, Spooner & Quarles* of Milwaukee, and for the respondent on that of *Whitehead & Matheson* of Janesville.

KERWIN, J. The injury complained of in this case is the loss of an eye, alleged to have been caused by an accident which occurred on May 13, 1915. The facts, so far as material, are sufficiently covered by the findings set out in the statement of the case.

The policy provides, among other things, that written

notice of injury must be given within twenty days after the date of the accident, and further provides:

"Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the company at Detroit, Michigan, or to any authorized agent of the company, with particulars sufficient to identify the insured, shall be deemed to be notice to the company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

The main question in the case is whether the provision of the policy respecting notice was complied with.

As appears from the findings and evidence, the injury was for some time after the accident regarded trivial and did not appear to affect the plaintiff's eye. It was not until about June 18th that plaintiff's eye caused him any inconvenience or showed any sign of having been injured by the accident. On June 21st plaintiff consulted Dr. Dwight, an eye specialist, whom he informed of the accident, and the doctor could not at that time say that the injury was due to the accident.

Immediately after consulting Dr. Dwight plaintiff called on the agent of the defendant, Mr. Davies, who had written the policy, and informed him of the accident and consulted him respecting the necessity of giving notice of the accident to the defendant, and advised him concerning his consultation with Dr. Dwight. Plaintiff also asked Mr. Davies whether it was necessary to give immediate notice of the accident and make a claim for indemnity. Mr. Davies thereupon informed plaintiff that the information furnished him by plaintiff was sufficient, and that plaintiff would lose no rights while awaiting the final determination of Dr. Dwight as to the cause and extent of the injury. The plaintiff thereafter took continuous treatment from Dr. Dwight, and on July 31st following was informed by the doctor that the sight of his eye was lost and that such loss was due solely to the accident.

On August 4th following, due notice of the injury was given to the defendant, and the question arises whether this notice satisfied the provisions of the policy.

The court below found that the notice was sufficient, and this court is of opinion that the finding is supported by the evidence. The evidence shows that Dr. Dwight had not definitely decided until July 31st that the accident was the cause of the injury and then so informed the plaintiff. The evidence also shows that the notice was served as soon as reasonably possible after July 31st.

It is conceded by counsel for plaintiff that the former decision (166 Wis. 498, 166 N. W. 4), so far as it goes, settles the law of this case.

On the former appeal, in considering the provisions of the policy respecting notice, this court said:

"The policy requires that written notice of 'injury' must be given within twenty days after the 'date of the accident causing such injury,' unless it be shown not to have been reasonably possible to give such notice within the time provided, and that it was given as soon as reasonably possible. The 'injury' and the 'accident' causing it are recognized as separate things by the policy itself, and the notice required is notice of 'injury,' not of the 'accident.' In the present case the injury is, of course, the loss of the eye, the accident the blow on the head. It is very plain that it was not possible for the claimant to give notice of the injury, *i. e.* the loss of the eye, within twenty days after the accident, because there was no such injury within that time, either actual or threatened, so far as any one could know. One cannot give notice of a fact which he neither knows nor has any means of ascertaining.

"The only question remaining is whether the allegations of the complaint show that written notice was given as soon as reasonably possible after the plaintiff obtained knowledge that there was an injury which was the result of the accident. We think this question must be answered in the affirmative."

It is further contended by respondent that the proof was sufficient to show that defendant waived written notice or

was estopped from asserting that no sufficient notice of the injury had been given. We do not find it necessary to decide this question and hence express no opinion upon it.

Counsel for appellant contends that it was prejudicial error to allow plaintiff, after the jury was discharged, to recall Dr. Dwight to correct his testimony. Dr. Dwight had testified in his examination before the jury was discharged that July 17th was the date when he determined that the accident was the sole cause of the injury to the eye, and then so informed the plaintiff. When recalled after the jury had been discharged and upon examination of his records he discovered that he was mistaken and that the date when he determined that the accident was the sole cause of the injury was July 31st, at which time he so informed the plaintiff. It seems to be established as a verity that Dr. Dwight was mistaken in his former evidence and that the time he informed plaintiff that the accident was the sole cause of the injury to the eye was July 31st and not July 17th; and since it is admitted that notice to the company was given August 4th next, it must be held as a matter of law that it was given "as soon as reasonably possible." The corrected evidence therefore raised no issue of fact for the jury, and defendant was not prejudiced by its waiver of a jury trial in moving for a directed verdict.

We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

WINSLOW, C. J., dissents.

JONES and another, Appellants, vs. WIXOM, Respondent.

November 4—December 2, 1919.

Crops: Necessity of consideration for contract to raise and deliver: Alteration of instruments: Authority or consent of person to be charged.

1. An agreement to raise a four-acre crop of tobacco and deliver it to a designated person at a stated price per pound, not supported by any consideration moving to the signers either by way of money or other thing of value, or of promises, is a mere naked offer and not enforceable.
2. The fact that the contract bore the indorsement of a certain sum of money for seed furnished by plaintiffs is insufficient to show a consideration, where such indorsement was made after the contract was signed and without the knowledge or consent of the person to be bound by the contract.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action begun in the municipal court of Rock county to recover damages for a breach of the following agreement:

"Janesville, Wis., April 6, 1917.

"This is to certify that I agree to raise 4 acres of broadleaf tobacco during 1917, amounting to about 8,000 pounds, for C. J. Jones & Son and deliver it at eight (8) cents per pound. Trash two (2) cents per pound. . . .

"J. C. WIXOM.
"H. W. HOLDEN."

Holden was a tenant of Mrs. Wixom and delivered his share of the crop. After the agreement was signed by defendant *Wixom* plaintiffs made the following indorsements thereon: "Received $2 in advance." "Gave *J. C. Wixom* $2.50 to apply on contract."

The above items covered the price of tobacco seed furnished by plaintiffs to Holden and defendant. The municipal court entered judgment for plaintiffs and the defendant appealed to the circuit court. After the evidence was in the court directed a verdict for the defendant and entered judgment accordingly on the ground that the contract lacked

consideration and mutuality and was therefore not binding upon either party. The plaintiffs appealed.

The cause was submitted for the appellants on the briefs of *Nolan & Dougherty,* and for the respondent on that of *Jeffris, Mouat, Oestreich, Avery & Wood,* all of Janesville.

VINJE, J. The evidence established the fact that defendant offered to pay plaintiffs for the tobacco seed at the time they agreed to furnish it, which was some time after the agreement was signed, but that they refused to receive any money because they did not know just how much seed they could furnish him. They would find out and leave it at a grocery store where he could get it, and where he did get it. He never knew they charged the amount to him on the contract or that they did so as to Mr. Holden. It therefore appears that no consideration moved from plaintiffs to defendant either by way of money or other things of value or of promises at the time the agreement was signed. It is elementary that there must be a consideration, either by way of money or other things of value or by way of promises, to constitute a valid contract. *Hopkins v. Racine M. & W. I. Co.* 137 Wis. 583, 119 N. W. 301, and cases cited therein; 6 Ruling Case Law, 686. Here there was neither. The offer of defendant was a mere naked one, not supported by an acceptance on the part of plaintiffs, for they do not agree to receive and pay for the tobacco, nor by any valuable consideration for an option to receive it at the price mentioned. The indorsement of $2.50 for tobacco seed was made some time after the contract was signed and without the knowledge or consent of defendant, and therefore it cannot affect the validity of the contract.

Appellants rely upon the case of *Eastern R. Co. v. Tuteur,* 127 Wis. 382, 105 N. W. 1067, to sustain the validity of the agreement. But in that case, while the railroad company did not agree specifically to give all its freight to Promberger to handle, it did specifically agree to

pay him for all he handled, and the court properly held that it impliedly agreed to give him all its freight. Here plaintiffs promise nothing for the option to receive defendant's crop of tobacco at a certain price per pound. The agreement is a mere naked offer, not founded upon any consideration or reciprocal promises, and is therefore not enforceable.

By the Court.—Judgment affirmed.

BUROFF, Appellant, vs. BERGMANN, Respondent.

November 5—December 2, 1919.

Brokers: Interest of principal in property sold: Commission: Procuring cause: Bringing parties together: Question for jury: Suspension of negotiations: Principal's knowledge of broker's efforts.

1. Where a broker is employed to secure a purchaser for a farm, no price being fixed by the seller, and the broker introduces or refers the seller to one with whom the latter makes a deal, he is entitled to his commission, where it appears that his act in bringing the seller and purchaser together is the efficient procuring cause of the sale.
2. In a broker's action for commission for having brought the defendant and the buyer together, the question whether the broker was the efficient procuring cause of the deal finally consummated was, under the evidence, for the jury.
3. The trial court could not say as a matter of law that suspension, followed by renewal within a month, of negotiations between the seller and a buyer procured by plaintiff, resulting in the consummation of a deal which, though not exactly, was substantially the deal under consideration when negotiations were suspended, eliminated the broker as the efficient procuring cause of the sale.
4. The evidence in this case is *held* sufficient to justify a finding by the jury that the defendant had knowledge that the party to whom he sold had had prior negotiations with plaintiff, though plaintiff did not expressly state to defendant that such party was a prospective purchaser.
5. The former owner of a farm, who retained a substantial interest in it, though he had previously conveyed the farm to his son, first taking a mortgage back but later releasing the mortgage and accepting the son's personal note, could lawfully

contract to pay a broker a commission if he should procure a purchaser for the farm, the son becoming too ill to work it so that it was necessary to sell.

APPEAL from a judgment of the county court of Dodge county: WILLIAM H. WOODARD, Judge. *Reversed.*

Action by real-estate agent to recover commission for the sale of a farm. Sometime prior to the 6th day of March, 1917, *August Bergmann,* being the owner of a farm in Dodge county, Wisconsin, conveyed it to his son for a valuable consideration, taking back a mortgage for $10,000. Subsequent thereto, and to enable the son to raise money on the farm, *Bergmann* released the $10,000 mortgage. The son paid him $2,400 and he took the son's note for $7,600, without any security. There is evidence that the defendant claimed an interest in the farm to the extent of $7,600. On the 6th day of March, 1917, the son's health was such that he could not continue the management of the farm, and it became desirable, if not imperative, to dispose of the same.

The complaint alleges that on the 6th day of March, 1917, the defendant engaged the plaintiff to procure a purchaser for said real estate, either for cash or trade. The evidence tends to show that the defendant listed the property with plaintiff at a cash price of $18,000, or $20,000 or $22,000 in trade, and agreed to pay plaintiff a commission of two per cent. if he produced a purchaser with whom a deal could be made. *Buroff,* the agent, made no headway in disposing of the farm until January, 1918, when one Knowlton, another real-estate dealer in Watertown, where *Buroff* was in business, came into his office, and, during a conversation, learned that *Buroff* had the *Bergmann* farm for sale. Knowlton was desirous of acquiring it, and suggested that a trade, satisfactory to *Bergmann,* might be arranged. *Buroff* took Knowlton to *Bergmann.* This was the first time *Bergmann* had met Knowlton. Negotiations for a trade were opened, and a proposition, which was called

a three-cornered deal, proposed. *Bergmann,* however, was not interested, and nothing came thereof.

There was a mortgage of $6,000 on the farm. Knowlton had two properties in Watertown, a house and lot on Emerald street and another on Western avenue. He also had a real-estate mortgage of $2,200. The next day, or very soon after the first meeting, Knowlton and *Buroff* saw *Bergmann* again, and a trade was proposed which contemplated that Knowlton should take the farm, assume the $6,000 mortgage, give back a second mortgage for $6,000, assign the $2,200 real-estate mortgage which he owned, trade in either the Emerald street or the Western avenue property, and pay $800 in cash. *Bergmann* and his wife looked at the Emerald street property, but did not look at the Western avenue property, as they expressed themselves satisfied with the former. They then returned to *Buroff's* office, where the details of the proposed trade were written out, handed to the *Bergmanns,* and they took the writing away with them for consideration. A day or two later *Buroff* and Knowlton again saw the *Bergmanns* and they expressed satisfaction with the proposed trade, except that they wanted a cash payment of $1,800 instead of $800, reducing the mortgage to be given back by Knowlton from $6,000 to $5,000. This was talked over, and Knowlton wanted to turn in another mortgage which he had for $500. Nothing definite was agreed upon, however, although it seemed probable that a satisfactory deal would be arranged, and matters were left in abeyance until weather conditions permitted Knowlton to examine the farm. Neither Knowlton nor *Bergmann* talked about the trade to *Buroff* again.

The evidence tends to show that sometime during February *Bergmann* met Knowlton at the Watertown fair and *Bergmann* said to him: "Haven't you some other properties that we could trade for that farm up there which *Buroff* had nothing to do with?" Negotiations were resumed and a deal concluded by which Knowlton took the farm, assumed

the $6,000 mortgage thereon, gave back a second mortgage for $5,000, assigned the $2,200 mortgage, conveyed a vacant lot on Twelfth street in the city of Watertown and the house and lot on Western avenue, referred to in the former negotiations, and paid $400 in cash.

This action was brought by plaintiff to recover a commission of $360. At the conclusion of the evidence the court directed a verdict against the plaintiff and in favor of the defendant, and from the resulting judgment the plaintiff brings this appeal.

Otto Kuenzli of Watertown, for the appellant.

For the respondent there was a brief by *Skinner & Thauer* of Watertown, attorneys, and *Clifford & Hartman* of Juneau, of counsel, and oral argument by *N. J. Thauer.*

OWEN, J. The question is whether a verdict should have been directed. In seeking to vindicate the action of the court in this respect, respondent contends that in order to entitle plaintiff to recover it was incumbent upon him to prove that he produced a purchaser who was ready, willing, and able to pay $18,000 for the farm. The rule is familiar that where a broker undertakes to sell at a price fixed by the owner, in order to entitle him to compensation it must appear that he produced a purchaser ready, willing, and able to pay such price. According to plaintiff's testimony, however, that was not his contract in the instant case. His version of the contract is that he was to receive a commission of two per cent. if he produced a purchaser to whom the farm was sold or traded. It is no doubt true that if he had produced a purchaser for the farm at $18,000 in cash he would have been entitled to recover upon his contract. That, however, was not all there was to the contract. The defendant indicated his willingness to trade, and, upon this kind of a deal, all the plaintiff could do was to bring the prospective purchaser or trader and the defendant together, from which point the negotiations were to be necessarily

conducted by, and result to the satisfaction of, the defendant.

The rule is well settled that where a broker is employed to secure a purchaser, no price being fixed by the seller, and he introduces or refers the seller to one with whom the latter makes a deal, he is entitled to his commission where it appears that the act of the broker in bringing the seller and purchaser together is the efficient procuring cause of the sale. *Burdon v. Briquelet,* 125 Wis. 341, 104 N. W. 83; *Burd v. Webster,* 128 Wis. 118, 107 N. W. 23; *Sexton v. Goodrich,* 131 Wis. 146, 111 N. W. 206.

Under the plaintiff's version of the contract, he was entitled to recover if he was the efficient procuring cause of the deal. Whether the contract was as claimed by him, and whether he was the efficient procuring cause of the deal finally consummated, was clearly, upon the evidence, a jury question. We do not attach any importance to the fact that at the time of listing the property the defendant said he wanted $20,000 or $22,000 in trade. The cash value of any trade is a matter of mutual adjustment of prices, and by a little shrinking or puffing of value the cash equivalent of the trade is entirely within the control of the principals. A broker's commission should not be made to depend upon whether the trade, reduced to terms of cash, upon values placed thereon by the owner, amounts to any given sum. Under such a contract the broker earns his commission when he has produced a person with whom the owner makes a trade; in other words, when it appears that the broker was the efficient procuring cause of the deal consummated.

Neither was it proper for the court to assume that the suspension of negotiations and their resumption at a later time, to the exclusion of *Buroff,* by defendant and Knowlton, resulting in the consummation of a deal somewhat different from that under consideration at the time of such suspension, took the question from the jury. The court could not say as a matter of law that the suspension of

negotiations and their renewal within a month, resulting in the consummation of a deal which, while not exactly, was nevertheless quite substantially, the same deal that was under consideration when such negotiations were suspended, eliminated plaintiff as the efficient procuring cause of the sale. *Willey v. Rutherford,* 108 Wis. 35, 84 N. W. 14.

To the point that the deal as actually consummated was substantially the same as the one under consideration when negotiations were suspended, it will be noted that there was an assumption of the $6,000 mortgage, the giving of a mortgage back for $5,000, the assignment of the $2,200 mortgage, the conveyance of the Western avenue property which Knowlton stood ready to turn in as a part of the original proposal instead of the Emerald street property, and the payment of a certain amount in cash. The only really new feature of the deal as consummated was the conveyance of the Twelfth street property.

It is further contended by the respondent that *Buroff* did not inform him that Knowlton was a prospective purchaser, and that, upon the authority of *Roberts v. Harrington,* 168 Wis. 217, 169 N. W. 603, he was at liberty to deal with Knowlton directly. That case simply held that the owner was at liberty to deal directly with one whom the agent had been endeavoring to interest in the purchase of the property where the owner had no knowledge of such fact and had no reason to believe that the agent had had prior negotiations with him. In the instant case, while *Buroff* did not expressly make the statement to the defendant that Knowlton was a prospective purchaser, that fact does not conclusively negative such knowledge on the part of the defendant. The nature of the negotiations was such that, to our minds, the defendant must have been innocent indeed if he did not know that Knowlton was negotiating for the purpose of securing the farm for himself. But however that may be, there was certainly sufficient evidence

to justify a finding by the jury that defendant had such knowledge.

A further contention is made that plaintiff should not be permitted to recover because he knew that defendant's son owned, or at least held the legal title to, the farm. There is nothing to this contention. The defendant had a very substantial interest in the farm, aside from the paternal interest which he had in the welfare of his son. No reason is perceived why he could not enter into a lawful contract to pay plaintiff a commission if he should procure a purchaser therefor. To our minds the case presents a clear question for the jury.

By the Court.—Judgment reversed, and cause remanded for a new trial.

CRAM, Appellant, vs. CRAM, Respondent.

November 5—December 2, 1919.

Divorce: Division of estate: Property derived mediately or immediately from the husband.

1. The plaintiff husband had $300 when he married, worked as a day laborer for three years, and became the possessor of different canning factories which prospered under his management and in which he invested his earnings as well as money borrowed. The defendant wife invested a $2,500 inheritance in one of the factories, and later the joint holdings of the parties were sold at a profit and the proceeds reinvested in properties which were held jointly by them. *Held*, that the property of the wife, except as to the $2,500, must be considered, for the purpose of division of the estate on divorce, as property mediately or immediately derived from the husband within the contemplation of sec. 2364, Stats.
2. In view of the situation of the parties, the conduct of the wife, and the fact that the estate of the husband is less than $18,000, while that of the wife is in excess of $13,000, an award to the wife of $5,000 is reduced to $1,000.

APPEAL from a judgment of the county court of Dodge county: WILLIAM H. WOODARD, Judge. *Modified and affirmed.*

This is an appeal by the plaintiff from a part of a judgment dissolving the bonds of matrimony between the parties and making a division and distribution of the plaintiff's estate by the county court.

The plaintiff brought this action for divorce from defendant on the grounds of cruel and inhuman treatment. The plaintiff appeals from that part of the judgment which divides and distributes between the parties plaintiff's property and estate, both real and personal, by awarding to defendant the sum of $5,000.

The parties were married April 24, 1895, at which time neither possessed any property excepting $300 belonging to the plaintiff. It appears that he worked as a laborer for three years after their marriage, and thereafter became processor and manager of different canning factories. These concerns prospered under his management. He borrowed money to invest in them and thereby accumulated some money which he invested in canning company stock. In 1901 defendant invested $2,500 of the money she received from her mother's estate in stock in a canning factory and held it in her name. Later plaintiff and defendant sold their joint holdings for twice what they had paid. This money was reinvested in various properties, title to everything being taken in both their names.

The court found upon trial of the case that the estates of plaintiff and defendant amounted to something over $30,000, of which defendant owns about $13,850. The judgment awards to the defendant the sum of $5,000 as final division of plaintiff's estate and directs that he pay $910 attorney's fees, costs and disbursements incurred in this action. Plaintiff appeals from that part of the judgment which distributes his estate.

For the appellant there was a brief by *Clark & Lueck* of Beaver Dam, and oral argument by *A. W. Lueck* and *Royal F. Clark*.

For the respondent the cause was submitted on the brief

of *Grady & Farnsworth* and *Bogue & Sanderson*, all of Portage.

SIEBECKER, J. The plaintiff assails that part of the judgment which awards a division and distribution of his estate. An absolute divorce was granted upon the plaintiff's complaint on the ground that defendant had treated plaintiff cruelly and inhumanly for a period exceeding four years immediately preceding the trial of the action. The court found that the plaintiff's separate property amounted to $19,400 and that defendant's separate estate was of the value of $15,000; that the plaintiff had debts and liabilities aggregating $2,350, and that defendant's property is subject to a mortgage of $1,150. Deducting the liabilities of the parties respectively from the value of their separate estates as found by the court, the husband's estate has a net value of $17,050 and the wife's $13,850. An examination of the record has led us to conclude that these valuations as found by the court cannot be disturbed and must be adhered to in determining a just and equitable division and distribution of property between the parties. The plaintiff contends that the trial court in making this distribution disregarded the equitable rights of the plaintiff to such parts of defendant's property as she derived from him, and the character and situation of the parties, and the plaintiff's impaired ability and health resulting from defendant's cruel and inhuman treatment. As appears in the foregoing statement, the parties had lived together as husband and wife for nearly twenty-four years at the time the decree of divorce was granted. Plaintiff was fifty-nine years of age and his health was impaired; defendant was forty-three years of age and in good health. At the time of their marriage neither one had any separate estate. Plaintiff, after their marriage, continued to work in a flour mill for a year, and thereafter he was employed in a pea-canning factory, of which he became general manager and superintendent

after two years, and thereafter continued in such employment to the time of the trial. It appears that his skill and industry greatly enhanced the profits of the business he conducted and that his and her accumulations were the result of his labor and industry, except that the defendant inherited $2,500 which she invested in 1901 in one of the canning companies which plaintiff conducted. It is apparent that the money which the parties invested in the so-called Cram building and its furnishings, of which each party, as the court found, now owns an undivided one-half interest, is largely the product of plaintiff's labor and skill. The defendant's interest therein and her $5,000 of canning company stock, after deducting the $2,500 contributed by her individually, is property mediately or immediately derived from the plaintiff, within the contemplation of sec. 2364, Stats., and must be so regarded to ascertain the legal and equitable rights of the parties for the purpose of making a division and distribution of the plaintiff's estate in this action. *Martin v. Martin,* 167 Wis. 255, 167 N. W. 304; *Roder v. Roder,* 168 Wis. 283, 169 N. W. 307; *Gauger v. Gauger,* 157 Wis. 630, 147 N. W. 1075.

The evidence amply sustains the findings of the court that defendant treated plaintiff in a cruel and inhuman manner and that she was guilty of such wilful misconduct as to show a reckless disregard of her marriage vows. The facts showing how the property of the parties was accumulated during their married life and that the value of the wife's estate was the result of the husband's labor and industry, considered in the light of her conduct which calls for the dissolution of the bonds of matrimony, present a case which requires that her estate so acquired must be considered in connection with the plaintiff's estate in making a final division and distribution between them in this action. We are persuaded that the trial court did not give "due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the

character and situation of the parties and the circumstances of the case," as contemplated by sec. 2364, Stats., in awarding the final division of the property as provided in the judgment entered. We are of the opinion that the $5,000 award to defendant out of the husband's estate is so excessive as to render it an inequitable and unjust division and distribution, and we find that the judgment must be modified by reducing the $5,000 so awarded by the trial court to $1,000, and as so modified the judgment stands affirmed. Neither party is to be awarded any costs or disbursements in this court; the defendant to pay the fees of the clerk of this court.

By the Court.—It is so ordered.

GULBRANSON-DICKINSON COMPANY, Respondent, vs. HOPKINS, Appellant.

November 6—December 2, 1919.

Bills and notes: Restrictive indorsement: Delivery: Transfer of title: Effect: Transfer without indorsement after maturity: Union of legal and equitable titles after maturity: Indorsement in trust: Action by beneficiary without joining trustee: Failure of consideration: Evidence: Presumption of similarity of laws of another state.

1. A payee's indorsement of notes to a bank "for credit account of" the plaintiff (payee's creditor) is a restrictive indorsement as defined by sec. 1676—6, Stats., conferring rights as fixed by sec. 1676—7.
2. In an action on notes which were payable in and were transferred in another state, there being no claim that the laws of such state were not the same as those of Wisconsin, the notes will be treated as if executed, delivered, and payable in Wisconsin, and indorsed there.
3. Indorsement of a note by the payee to a bank "for credit account of" the plaintiff transferred the whole title in the note to the bank for the benefit of the plaintiff.
4. Under sec. 2605, providing that every action must be prosecuted in the name of the real party in interest, one for whose benefit a note was indorsed to another may maintain an action

upon the note in his own name without joining the person to whom the note was indorsed; sec. 2607, providing that the trustee of an express trust may sue without joining the beneficiary, being permissive, and not requiring that the beneficiary be joined with the trustee.

5. An indorsee under a restrictive indorsement takes a title qualified either as to person or use, and the delivery of the instrument gives effect to the indorsement, and it passes to the indorsee subject to all the restrictions imposed upon it.
6. While as between the payee and the plaintiff, its creditor, beneficiary of the payee's indorsement of notes to a bank, the proceeds of the note, when paid, were to be applied to plaintiff's use, plaintiff was not in any sense of the term an indorsee, and the instruments not being delivered to it until after due and it having no legal title thereto, the instruments in plaintiff's hands were nonnegotiable and subject to any defense which might have been made against them in the hands of the payee.
7. Where notes were not accepted by plaintiff, creditor of the payee, and were not held as collateral by the bank to which they were indorsed, but were held as trustee for plaintiff's benefit, the bank, as indorsee, is within the provisions of sec. 1676—6, relating to restrictive indorsements, and the principle that an indorsee accepting negotiable paper as collateral security may be a holder for value does not apply.
8. Where a note was not delivered to plaintiff, beneficiary of a restrictive indorsement, until after due, plaintiff did not become the owner and holder before maturity, and hence did not have a legal right to unite with his equitable title before maturity.
9. In an action on notes given for advertising matter and services in business promotion, the evidence is *held* sufficient to show a failure of consideration.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Reversed.*

Action on notes. The defendant was engaged in the general merchandise business at West De Pere, Wisconsin. The Brenard Manufacturing Company was a copartnership in Iowa City, Iowa, engaged in a general advertising and business promotion enterprise. On March 25, 1916, the defendant and the Brenard Manufacturing Company entered into a contract by the terms of which the manufacturing company was to deliver to the defendant certain adver-

tising matter and render certain services in promoting the defendant's business, in consideration of which the defendant executed and delivered to the manufacturing company six notes amounting in the aggregate to $340. The merchandise contracted for was to be used as premiums or prizes, to be distributed by the defendant in the manner directed, and it was agreed that, if defendant's sales were not increased in an amount specified, certain payments were to be made by the manufacturing company to the defendant. One note, amounting to $60, was paid. On April 12, 1916, and before any of the notes given by the defendant were due, the manufacturing company, being indebted to the plaintiff, gave the plaintiff its note, and contemporaneously therewith transferred as collateral security the notes in question by the following indorsement: "Pay to the order of Iowa City State Bank, Iowa City, Iowa, for credit account of *Gulbranson-Dickinson Co.* BRENARD MANUFACTURING CO." The defendant failed to pay the notes at maturity; they were indorsed by the Iowa City State Bank to the First National Bank of Chicago, by whom they were returned to the Iowa City State Bank. Thereafter the plaintiff brought this action. There was a jury trial. The jury by special verdict found: (1) That the plaintiff did not become the owner of the notes in question in due course of business for a valuable consideration; (2) that there was a failure of consideration to the defendant of the notes remaining unpaid and sued upon. Upon motion of the plaintiff the answer to the first question in the special verdict was changed from "No" to "Yes," and upon the verdict so amended judgment was rendered for the plaintiff for $327.50, principal and interest, and costs. From this judgment the defendant appeals.

For the appellant the cause was submitted on the briefs of *Cady & Strehlow* of Green Bay.

For the respondent there was a brief by *Herb J. Smith* of De Pere, attorney, and *Kittell & Jaseph* of Green Bay, of counsel, and oral argument by *Lynn D. Jaseph.*

ROSENBERRY, J. The plaintiff claims that it is entitled to recover because it is a holder in due course. That the indorsement is restrictive as defined by sec. 1676—6, Stats. 1917, is conceded. The notes are dated at West De Pere, Wisconsin, and are payable by their terms at Iowa City, Iowa, where the notes in the contract appear to have been sent for acceptance by the payee named in the note. No claim is made that the laws of Iowa, where the note was payable and where it was transferred, are not the same as those of Wisconsin; therefore we treat the case as if the notes were executed, delivered, and payable within the state of Wisconsin, and indorsed there.

Sec. 1676—7, Stats. 1917, states the rights conferred upon the trustee under a restrictive indorsement. He may (1) receive payment of the instrument; (2) bring any action thereon that the indorser could bring; (3) transfer the rights as such indorsee where the form of the indorsement authorizes him to do so; but all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Indorsements restrictive as to persons are of two kinds: first, those for the benefit of the indorser; and second, those for the benefit of a third person. An indorsement for the benefit of the indorser constitutes the trustee the agent of the indorser, the beneficial interest remaining in the indorser, while an indorsement for the benefit of a third person transfers the title in the instrument to the indorsee. *Hook v. Pratt,* 78 N. Y. 371; 8 Corp. Jur. 366. The indorsement of the instrument in question by the manufacturing company to the Iowa City State Bank for the benefit of the plaintiff transferred the whole title in the instrument to the bank for the benefit of the plaintiff.

The question then arises, Can the plaintiff, for whose benefit the indorsement was made, maintain an action upon the note? This question must be answered in the affirmative. Sec. 2605, Stats., provides that every action must be prosecuted in the name of the real party in interest.

While sec. 2607 provides that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, it is permissive, and does not require that the person for whose benefit the trust was created be joined with the trustee. *Piotrowski v. Czerwinski,* 138 Wis. 396, 120 N. W. 268; 8 Corp. Jur. 824.

The question then arises, Is the plaintiff entitled to recover upon the notes as a holder in due course? The defendant contends that under the provision of sec. 1676—17, Stats., which provides that an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise, the plaintiff cannot be such a holder in due course, because of the fact that the instruments in question were restrictively indorsed.

The plaintiff contends that the instruments in question passed to the indorsee as negotiable instruments, so as to constitute the indorsee the holder in due course, the restrictive indorsement becoming operative only as against subsequent transferees. It is established beyond question that an indorsee under a restrictive indorsement takes a title qualified either as to person or use. The delivery of the instrument gives effect to the indorsement, and it passes to the indorsee subject to all restrictions imposed upon it. The indorsee in this case parted with nothing of value. While as between the manufacturing company and the plaintiff the money when paid was to be applied to the use of the plaintiff, the plaintiff was not in any sense of the term an indorsee. The instruments in question were not delivered to it until after due. It had no legal title thereto. Its right to maintain an action upon the notes so indorsed arises out of no incident of the instrument as negotiable paper, but rather arises out of the practice acts which require the suit to be brought in the name of the real party in interest. It does not appear that the notes were delivered to plaintiff under such circumstances as to pass the legal title

thereto. While no doubt the Iowa City State Bank, by the terms of the indorsement, could have transferred or negotiated the instrument in question, the rights of the transferee would have been subject to the terms of the indorsement, and such second indorsee would not have the rights of a holder in due course. Any transfer by the Iowa City State Bank would have been subject to the rights of the plaintiff and notice to all subsequent transferees of the plaintiff's right to the proceeds of the instrument in question. Our attention is called to *Hook v. Pratt,* 78 N. Y. 371. This case, however, does not pass upon this point. The question there involved was whether or not it was incumbent upon an indorsee under a restrictive indorsement to prove consideration, or whether consideration was imported by the indorsement. In *National City Bank v. Wescott,* 118 N. Y. 468, 475, 23 N. E. 900, *Hook v. Pratt, supra,* and *White v. Miners' Nat. Bank,* 102 U. S. 658, are cited on the proposition that a restrictive indorsement rendered the check in question nonnegotiable. The instruments in the hands of the plaintiff were therefore nonnegotiable and subject to any defense which might have been made against them in the hands of the manufacturing company. We do not overlook the fact that an indorsee accepting negotiable paper as collateral security may be a holder for value. *Shaffer v. Peavey,* 161 Wis. 149, 152 N. W. 829.

The trouble is that the notes were not accepted by the plaintiff and were not held by the Iowa City State Bank as collateral, but as trustee for the benefit of the plaintiff, and the Iowa City State Bank as indorsee is therefore plainly brought within the provisions of the statute relating to restrictive indorsements. While the indorsement rendered the instruments nonnegotiable, they were valid and transferable, and the plaintiff is entitled to recover thereon in the event that the defendant failed to establish a valid defense thereto.

The plaintiff further claims that the delivery of the note to plaintiff united the legal and equitable title and so constitutes the plaintiff the owner, with exactly the same right as if the original indorsement had been in the usual and unrestricted form. It appears from the evidence that the note was not delivered to the plaintiff until after due. It could not, therefore, become such owner and holder before the maturity of the note, and we are not called upon to consider or discuss what the effect would have been had there been a union of the legal and equitable titles before the notes became due.

The jury found that there was a failure of consideration to the defendant as to the notes sued upon. The court set aside the finding of the jury upon motion, and held that there was no failure of consideration. The object and purpose of the advertising campaign was to increase the sales of defendant during the twelve-months period specified in the contract. While the manufacturing company agreed that if one and eight-ninths per cent. of the defendant's gross sales did not amount to $340 it would pay to the defendant any deficiency, in cash, and the defendant testified upon the trial that he had no claim under that clause of the contract, that does not dispose of the question whether or not there was a substantial failure of consideration. It appears with reasonable certainty that the amount of the defendant's sales was increased, but that increased amount of sales was due to advance in prices resulting from war conditions and not to any increased betterment of business. It clearly appears that a considerable part of the goods contracted for were never shipped, or, if shipped, were never received by the defendant, that the campaign was not put on in the manner and at the times specified in the contract, and there is evidence from which the jury was warranted in believing that the business of the defendant was injured rather than promoted by reason of the manufacturing com-

pany's failure to carry out its contract according to its terms.

Without attempting to recite the entire evidence, we are clearly of the opinion that there was sufficient evidence to sustain the jury's answer to question 2—that there was a failure of consideration as to the notes remaining unpaid and sued upon. The trial court was therefore in error in setting aside the answer to question 2, and that part of the verdict should have been allowed to stand. The plaintiff not being a holder in due course for value, and the defendant having established a valid defense to the notes, judgment should have gone accordingly.

By the Court.—Judgment reversed, with directions to dismiss the plaintiff's complaint.

DENIS, Appellant, vs. NU-WAY PUNCTURE CURE COMPANY, Respondent.

November 6—December 2, 1919.

Corporations: Payment of promotion expenses by commission from sale of stock: Liability for fraud of company and stock salesman: Question for jury: Knowledge of efficiency of product: Remedies by rescission or action for damages: Evidence: Affirmance of sale: Adjustment with agent not a bar to action: Sales: Necessity of knowledge of falsity of representations.

1. Although under sec. 1753, Stats., a corporation cannot issue its stock for any sum less than the par value thereof, it can pay promotion expenses incident to and necessarily incurred in the sale of the stock, and may compensate one who sells its stock by means of a contract to pay commissions of twenty-five per cent. of the amount sold.
2. If representations inducing a sale were material and false, and the maker knew or should have known that they were false, or made them recklessly without knowledge, and the injured party relied on them as true without present means of knowledge of their falsity, and suffered damage, he was defrauded in the legal sense.

3. In an action to recover the purchase price of corporate stock upon rescission of the contract of purchase for fraud and deceit, the question whether those interested in the corporation should have known that the product to be manufactured was inefficient for the purposes claimed is, under the evidence, for the jury.
4. If a stockholder was defrauded in the sale of stock to him by the president of the company acting as its selling agent for commission, the president and the company were both jointly and severally liable to him.
5. One who was induced to purchase stock in a corporation through the false representations of its president, the company's agent to sell stock, had the right either to restore the original status, rescind the contract of purchase and recover back his money, or could offer to restore the stock, and, by keeping the offer good, sue in equity for rescission of the contract and recovery of his money, or could sue the president or the company, or both, at law for damages resulting from the president's fraud.
6. The question whether a subsequent transaction, whereby the president agreed to take back the stock from the purchaser, was a sale of the stock to him inconsistent with rescission of the contract of purchase, or was a mere adjustment of the purchaser's claim for fraud, is for the jury.
7. Where a company's agent to sell its stock committed a fraud, the purchaser can recover the price of the stock on rescission for the fraud, despite his prior efforts to secure redress from the agent, who actually committed the fraud, his claim against the company being extinguished only so far as the agent had reimbursed him, unless the transaction with the agent amounted to a resale of the stock to the agent and an assertion of ownership and affirmance by the purchaser.
8. On rescission of the contract of purchase for fraud and deceit, the purchaser should have been permitted to show that the defendant company had gone out of existence and was not doing business, the evidence having a bearing on the questions whether the company's product was meritorious and whether the purchaser sustained any injury from the misrepresentations made to him.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Reversed.*

Action by a stockholder to recover the purchase price of corporate stock purchased from the defendant corporation, upon rescission of the contract of purchase because of fraud

and deceit. The *Nu-Way Puncture Cure Company* is a corporation organized under the laws of the state of Wisconsin, with an authorized capital stock of $20,000. It was the owner of an alleged secret formula for a preparation which it was claimed would immediately heal or cure all punctures in automobile tires when placed in the inner tubes thereof. This so-called secret formula was neither patented nor registered. It was purchased from one Moore, who was president of the company, to whom $15,000 of the stock of the company was issued therefor. Moore, the president, was appointed the fiscal agent of the company for the disposition of its stock, and by the terms of his employment he was to receive twenty-five per cent. of the value of the stock sold. Whenever he sold stock he kept twenty-five per cent. of the purchase price thereof and accounted to the corporation for the remaining seventy-five per cent. The plaintiff purchased twenty shares of the stock of the company, paying $200 therefor. He purchased the stock from Moore. Moore represented to him that if such product manufactured from said secret formula was placed in the inner tubes of automobile tires it would not damage them, but that it would instantly close and seal any and all punctures, holes, and injuries that such tubes customarily or usually received; that no one else could use such cure, and that none other of a similar kind, make, or purpose was known or in existence; that the defendant alone had the right to manufacture such cure; that said company had derived and would derive very large profits from the manufacture thereof, and without competition from any other similar manufacture or product. An inflated inner tube, filled with this material, was on display in the office of the company. Under such circumstances, a puncture thereof would be immediately filled by the material placed therein, and the tube would not be deflated by reason of the puncture. Subsequent actual and practical use of this material quickly demonstrated that it was a complete failure, for

two reasons: first, its presence in the inner tube rotted and destroyed it; second, when the weight of an automobile was superimposed on the tire such weight forced the material through the puncture and it failed to seal or close the opening, as it would unquestionably do in the absence of any weight imposed upon the tube. The company could not sell its product, and quickly went out of business.

Upon discovery by the plaintiff that the product was a failure and that the representations made to him were untrue, he tendered back his stock and demanded a return of his money. He made this demand of Moore, the person from whom and through whom he purchased his stock. Moore agreed to take the stock back and to return to him the $200 paid therefor. He paid $15 down, and at the time of the trial had paid $50 altogether. His agreement to take the stock back is in writing, and is as follows:

"May 12, 1917.

"I hereby agree to take the certificate of *Joseph F. Denis, Sr.*, being No. 79 and No. 80, for ten (10) shares each in the *Nu-Way Puncture Cure Company* and to pay therefor two hundred ($200) dollars on or before May 21, 1917.

"R. C. MOORE."

As collateral security for the $200, Moore deposited with the plaintiff a certificate for forty-one shares of the stock of said company.

The case was tried before the court and a jury. At the conclusion of the testimony the court directed a verdict in favor of the defendant, upon the express ground that the transaction between plaintiff and Moore by which Moore agreed to pay plaintiff the $200 was not a rescission of the contract of purchase but a sale of the stock; that after having acquired knowledge of the fraud, the transaction with Moore operated as an election on the part of the plaintiff to affirm the contract of purchase and keep the stock. A judgment was entered in favor of the defendant dismissing

plaintiff's complaint, and from the judgment so entered plaintiff brings this appeal.

Sol. P. Huntington of Green Bay, for the appellant.

For the respondent there was a brief by *Kittell & Jaseph* of Green Bay, and oral argument by *Lynn D. Jaseph.*

OWEN, J. This is an action to recover the purchase money upon the rescission of a contract for the purchase of capital stock in the defendant company, it being claimed that the purchase was induced by false and fraudulent representations on the part of the company. The court directed a verdict in favor of the defendant upon the ground that the plaintiff had not rescinded nor offered to rescind, and that his transactions with Moore, the president of the company, amounted to a resale of the stock and were inconsistent with a rescission of the contract of purchase. The question of whether a case of fraud was proved entitling plaintiff to recover was not passed upon by the trial court. It is urged on the part of the respondent that, whether the court was or was not right in directing a verdict upon the grounds specified, the verdict nevertheless was properly directed because actionable fraud was not proven. Before proceeding to a consideration of the grounds assigned by the court for its action it is proper to consider whether, in any event, the record discloses a jury question.

The plaintiff claims fraud because, first, the stock of the corporation was sold for less than par, in violation of the provisions of sec. 1753, Stats., which provides:

"No corporation shall issue any stock or certificate of stock except in consideration of money or of labor or property estimated at its true money value, actually received by it, equal to the par value thereof, nor any bonds or other evidences of indebtedness except for money or for labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof, and all stocks and bonds issued contrary to the provisions of

law and all fictitious increase of the capital stock of any corporation shall be void."

His contention is that, by reason of the payment to Moore of the twenty-five per cent. commission for the sale of the stock, which was retained by him, the par value of the stock was not paid into the corporation, and that this operated as a fraud upon the subsequent purchasers of stock. While the statute requires that the full par value of stock shall be paid into the company, a corporation is not prohibited from expending money necessary for its promotion and for the sale of its stock. While a corporation cannot issue stock for any sum less than the par value thereof, it can pay expenses incident to and necessarily incurred in the sale thereof. If it deems a commission contract, such as the one given to Moore, wise and provident, no reason is perceived why it cannot compensate one who sells its stock in this manner as well as in any other. We do not think this ground of fraud can be sustained.

As to the alleged fraudulent representations concerning the virtues of the product which this corporation was organized to manufacture and sell, it may be stated that it appears without dispute that the representations as alleged in the complaint were made to the plaintiff, and that subsequent practical use of the product proved that it was entirely worthless and a complete failure. It is claimed, however, that the officers of the company believed that the product was meritorious and that it would accomplish all claimed for it, and that the representations were made in the best of faith and in the entire absence of any fraudulent purpose. The question, therefore, comes to this: It appearing from the evidence that the merits and efficiency of the product were misrepresented to the plaintiff, can it be said as a matter of law that such misrepresentations were not actionable because those making them believed the product to be as represented? In this state the rule is that

"If the representations were material and false, and the

maker thereof either knew or ought to have known that they were false, or if he made them recklessly, with no knowledge on the subject, and the injured party relied upon them as true, without the present means of knowledge of their falsity, and suffered damage thereby, then the fraud is complete." *Krause v. Busacker,* 105 Wis. 350 (81 N. W. 406), at p. 354; *First Nat. Bank v. Hackett,* 159 Wis. 113, 149 N. W. 703.

It will thus be seen that knowledge of the falsity of representations on the part of those making them is not essential. It is sufficient if those making them ought to have known they were false.

The jury might well have found from the evidence that those interested in the company should have known that the product was inefficient for the purposes claimed. One of the witnesses, who was the proprietor of a taxicab business operating seven automobiles, testified that he was solicited to purchase stock in the company; that before doing so he tested the product and found that while it might seal a puncture in an inner tube, blown up for the purpose of testing, it also rotted the tube at the point of puncture within a very short time, from which he concluded that use of the preparation was not desirable and declined to buy any stock. Other witnesses testified to its failure to do the work claimed for it in case of punctures of tires while in actual use upon automobiles. The jury might therefore very well conclude that, if the failure of the product was so easily demonstrable, those in charge of the company's affairs should have known it, and that what prospective purchasers of stock could so easily prove for themselves should have been known by the officers of the company. In our opinion, this phase of the case was clearly a jury question.

We come now to consider whether the court was right in directing the verdict on the ground that the action of plaintiff in dealing with Moore amounted to a resale of the stock and was inconsistent with a rescission of the contract of purchase. We could readily agree with this conclusion if

he had made a sale of the stock to a third party, one not connected with the company nor with the original contract of purchase. In such a case the resale of the stock would evidence a claim of ownership and indicate an affirmation rather than a rescission of the original contract of purchase. But is that the case here? If plaintiff had been defrauded, Moore and the company were both jointly and severally liable to him. *Heckendorn v. Romadka,* 138 Wis. 416, 120 N. W. 257. The plaintiff had open to him one of several courses to remedy the wrong: He had the right to restore the original situation, rescind the contract and recover back his money. He could offer to restore, and, by keeping such offer good, could sue in equity for a rescission of the contract and for a recovery of his money; or he could have sued Moore, or the company, or both of them, at law for the damages resulting from the fraud. *Ibid.* Upon discovering that he had been defrauded he went to Moore for the purpose of securing redress for the fraud. It is true that he first went to the secretary of the company, but was referred by the secretary to Moore. Moore, it will be borne in mind, was the person who represented the company in making the sale of the stock to the plaintiff, and it was quite natural and proper that the secretary should refer plaintiff to Moore, if, indeed, any significance attaches to the incident at all. It is quite apparent from plaintiff's testimony that his purpose in going to Moore was to secure restitution and not for the purpose of making a resale of the stock, and, as we view it, the written memorandum given plaintiff by Moore in which he agreed to "take" his stock, is just as consistent, if indeed not more so, with a rescission of the contract of purchase or an adjustment of plaintiff's claim or grievance as it is with the idea that plaintiff was making a sale of his stock to Moore. Plainly his object in negotiating with Moore was to secure restitution of the money paid for the stock. To secure this he was willing to surrender his stock. Moore agreed to pay back his money and take

his stock. Under the circumstances we do not think the trial court was justified in holding as a matter of law that the transaction with Moore constituted a sale of the stock. At the least, it was for the jury to say whether the transaction was a sale of the stock to Moore or an adjustment of the claim for fraud.

If it was not a sale, no reason is perceived why this action may not be maintained against the company. Both Moore and the company were liable. His efforts to secure redress from Moore in no manner affected the liability of the company. His claim against the company is extinguished in so far as Moore has reimbursed him, and no farther. For the balance the company is still liable, unless of course the jury should find that the transaction with Moore amounted to a sale of the stock and an assertion of ownership on the part of the plaintiff. It follows that the court was in error in directing the verdict, and that the case should have been submitted to the jury.

Error is also assigned because the court refused to permit plaintiff to show that the company had gone out of existence and was not now doing business. Inasmuch as there must be a new trial, we deem it proper to briefly consider this alleged error. It seems to us that this evidence has a bearing upon the question of whether the product proved to be a meritorious one and came up to the representations made concerning it. It also has a direct bearing upon the question of whether plaintiff sustained any injury as a result of the misrepresentation, an element which must be proved to maintain his action. We think the evidence should have been admitted.

Other errors assigned by the plaintiff have been considered. None of them, except as herein discussed, appear to be well grounded, and are not of sufficient importance to justify separate treatment here.

By the Court.—Judgment reversed, and cause remanded for a new trial.

CARLSON and another, Respondents, vs. SCANDIA LIFE INSURANCE COMPANY, Appellant.

November 6—December 2, 1919.

Insurance: Insured entering military service: Provision in policy as to days of grace: Construction given policy by company.

1. A clause in a life insurance policy allowing thirty-one days of grace for payment of all premiums after payment of the first was properly construed by the trial court as applying to a provision requiring a written permit to be obtained and an extra premium to be paid in case of the assured's entry into the military service, the two provisions not being entirely clear and the company having construed the provision for thirty-one days of grace during which the policy remained in force as applying to the military service provision.
2. Where two constructions are possible, the construction given to clauses of a life insurance policy by the company itself must be considered as very persuasive.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action upon an insurance policy. The facts were stipulated. One Francis Carlson, deceased, took out a policy of insurance on his life for $1,000 in the defendant company March 6, 1918, payable to the plaintiffs, and paid the first annual premium thereon. The policy was by its terms effective from December 1, 1917, and contained a provision to the effect that after the payment of the first annual premium a grace of thirty-one days would be allowed for the payment of any subsequent premium or instalment thereof, the policy meanwhile continuing in force, but that in case of the death of the insured within the thirty-one days the sum necessary to complete the premium payment would be deducted from the amount of the policy. A subsequent clause of the policy provided that it should be incontestable one year from date of issue except for nonpayment of

premiums or violation of the conditions relating to military or naval service in time of war, and also provided that

"Military or naval service in time of war is a risk not assumed under this policy unless a written permit therefor at a rate of extra premium to be fixed by the company shall be granted; and if without such permit signed by an executive officer of the company, and without payment of such extra premium, the insured shall die while so engaged or within six months thereafter, then the liability of the company under this policy shall be limited to the return of the premiums paid thereon without interest."

Francis Carlson was drafted into the United States military service September 4, 1918, and sent to Camp Grant at Rockford, Illinois. On the 8th of September he sent a letter to the agent of the company stating that he had decided to keep up his insurance and inquiring as to when he must begin paying the extra premium of $37.50. To this letter the company replied September 16th stating that there was inclosed a request for him (Carlson) to execute if he desired to have a military permit attached to his policy, and that

"When returning this request for permit you will kindly also return your policy in order that it may be changed to suit the conditions. The company's rule requires that the application and payment for a permit should be made within thirty-one days after entering military service and the rate of premium for the permit is $37.50 per thousand per annum. Accordingly you should remit the proportionate part of $37.50 to cover the permit from the date you entered military service until December 1, 1918. Extra premiums are payable at the same time regular premiums on the same policy are payable."

The insured was thereafter sent to Camp Hancock, Georgia, and died in the military hospital at that camp while still in the service, October 2, 1918, having never been an actual combatant. Proofs of death were duly furnished,

The trial court found that the policy continued in force under its terms until thirty-one days after September 4, 1918, and rendered judgment for the plaintiffs for the face of the policy less the proportionate part of the extra military premium for the year ending December 1, 1918. The defendant appeals.

The cause was submitted for the appellant on the brief of *Geo. F. Merrill* of Ashland, and for the respondents on that of *A. W. MacLeod* of Washburn.

WINSLOW, C. J. The trial judge construed the clause of the policy allowing thirty-one days grace for the payment of all premiums after the payment of the first annual premium as applying to the provision requiring a written permit to be obtained and an extra premium to be paid in case of entry into military service. The insured having died within the thirty-one day period, the conclusion that the company was still liable on the policy naturally followed.

It might be somewhat doubtful whether this construction of the two provisions would be the most logical as an original proposition. However, the meaning of the two provisions cannot be said to be entirely clear; and in a case where two constructions are possible, the construction given to them by the company itself must be considered as very persuasive. Certainly in such case the company should not complain if that construction be adopted by the court. It is very clear that the company construed the provision for thirty-one days of grace during which the policy continued in force as applying to the military service provision, and we think under the circumstances of doubt as to the logical construction the trial judge was right in following the company's construction.

By the Court.—Judgment affirmed.

TRZEBIATOWSKI, Respondent, vs. TOWN OF PIKE LAKE, Appellant.

November 6—December 2, 1919.

Highways: Defect on boundary line between towns: Joint liability.

Where two towns were negligent in permitting a telephone wire running diagonally across the road where it intersected the boundary line between the towns, to sag below the clearance height of twenty-four feet required by sec. 1329*a*, Stats., the fact that plaintiff's injury was caused by the overturning of a buggy in which she was driving, after its canopy top came in contact with the defect in one town, does not alter the fact that the default of each town concurred as the proximate cause of the result so as to render them jointly liable under sec. 1339.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

This is an action to recover damages for injuries alleged to have been suffered by plaintiff, caused by a defective highway in the towns of *Pike Lake* and Ringle. The case was considered by this court upon an appeal from the judgment of the trial court overruling the demurrers to the complaint of the defendants. This court sustained the ruling of the trial court on the demurrer (165 Wis. 637, 163 N. W. 165). The facts there stated need not be repeated here.

The complaint is for damages for injuries alleged to have been received by the plaintiff by reason of a defective condition of the highway at the town line over which the highway extends north and south and in adjoining parts thereof in both of the defendant towns. The defect consists of a wire extending diagonally across the boundary line between the two towns.

Upon trial of the case the jury rendered a special verdict in which they found, in answer to separate questions, that the position and condition of the telephone post and wire where the wire crossed the road at the town line between

the towns of Ringle and *Pike Lake* caused the road to be not reasonably safe for public travel in both towns at the time of the alleged accident; and that such unsafe condition of the road in the towns of Ringle and *Pike Lake* respectively was the proximate cause of the injuries received by the plaintiff.

Judgment was entered awarding plaintiff damages and costs in the sum of $529.62. The town of *Pike Lake* appeals from this judgment.

For the appellant there was a brief by *Brown, Pradt & Genrich* of Wausau, and oral argument by *L. A. Pradt.*

For the respondent the cause was submitted on the brief of *Regner & Ringle* of Wausau.

SIEBECKER, J. The trial court's statement of the case in its decision of the motions made by the parties after verdict accurately and succinctly describes the *locus* and the surrounding conditions involved in the questions raised on this appeal:

"The defect in the road which rendered it dangerous to travelers consisted of a wire extending diagonally across the road at its intersection with the town line between the towns of *Pike Lake* and Ringle, starting from a pole in the town of *Pike Lake* located seventy-four feet south from the line and at the height of sixteen feet and extending to a pole at or near the surface of the earth ninety-two feet north of the town line. It thus appears that at the town line the wire must have been approximately eight feet above the surface, if we allow for such sagging of the wire as must have existed in the 164-feet stretch between points of support.. This is subject to variation on account of relative elevation of the grade of the road and the points at which the poles were located."

The statutes require the wire at this crossing to be twenty-four feet above the surface. Sec. 1329*a*, Stats.

It appears that the plaintiff was driving southward in a canopy top buggy in the town of Ringle, approaching the

town line; that the wire caught near the top of the canopy, making a noise and causing the horses to start suddenly to go faster; the pressure of the buggy top against the wire broke it and then the buggy and wire became entangled and the buggy tipped over, causing the injuries complained of. The defect in the road caused by the wire, as found by the jury, existed at the town line and hence it was common to both towns. Such a defect, as declared by this court on the former appeal of this case (*Trebowoski v. Ringle,* 165 Wis. 637, 163 N. W. 165), ". . . in a proper sense, may be said to be within either or both [towns] and so that the words of the statute [sec. 1339] 'in any town' apply to such point as regards either municipality. It follows that . . . both are in duty bound to maintain the highway at such point in a reasonably safe condition for public travel. Failure to do so is a joint and several liability, in case of damage to any one in his person or property happening thereby." This decision clearly and properly determines that such a defect is common to the road of both towns. The evidence fully sustains the finding that the default of both towns produced this defect, which, "in a proper sense, may be said to be within either or both."

The accident to plaintiff is clearly attributable to the defect common to both towns. The fact that the buggy top first came in contact with the defect in one town does not alter the fact that the default of each town concurred as the proximate cause of the result. The result of the situation is that the failure of duty of both towns co-operated and concurred to produce the defect which proximately caused the plaintiff's injuries. It is considered that the trial court properly held that the defendant towns are jointly liable for the damages recovered by the plaintiff.

By the Court.—The judgment is affirmed.

CITY OF MILWAUKEE, Appellant, vs. FERA and another, Respondents.

November 7—December 2, 1919.

Workmen's compensation: Liability of city to injured employee of contractor: Service incidental to employment: Taking horse and wagon to barn after finishing day's work.

1. A garbage collector whose immediate employer was employed by the city of Milwaukee to collect garbage and convey it by wagon to the city incinerator was, in view of sec. 2394—6, Stats., entitled to compensation from the city for injuries sustained while performing service growing out of and incidental to his employment, notwithstanding his immediate employer was not subject to the provisions of the workmen's compensation act.
2. Such employee, injured as a result of his horses becoming frightened while he was taking his equipment, part of which was owned by the city, back to the barn of his immediate employer after having taken his last load for the day to the city incinerator, was at the time of the accident performing service growing out of and incidental to his employment within the meaning of sub. (2), sec. 2394—3.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award of the *Industrial Commission* under the workmen's compensation act. The claimant, *Gaetona Fera,* on November 21, 1917, was employed as a garbage collector in the city of *Milwaukee.* His immediate employer was one Boadi, who was employed by the city to collect garbage and convey it by wagon to the city incinerator. Boadi was not subject to the compensation act. *Fera* began work each day at about 2 o'clock a. m. and finished at about 8 a. m. On the day of the accident he had taken his last load to the incinerator and unloaded it and was taking his equipment, consisting of a horse and wagon which belonged to his employer, Boadi, and the garbage box which belonged to the city, back to a barn belonging to Boadi on East Water street in the city, where it

was usually kept after work each day until the work commenced again the next morning. On the way to the barn the horse became frightened and the wagon was tipped over, throwing *Fera* to the ground, seriously injuring him. The award of the *Commission* in favor of *Fera* was sustained by the trial judge and the city appeals.

For the appellant there was a brief by *Williams & Stern* of Milwaukee, and oral argument by *Erich C. Stern.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker.*

WINSLOW, C. J. In order to be entitled to compensation under the workmen's compensation act the claimant must have been, at the time of the accident, (1) an employee of the party of whom compensation is claimed, and (2) performing some service growing out of and incidental to his employment. Sec. 2394—3, Stats. It seems clear to us that the claimant here answered both requirements.

It must be conceded, not only that the claimant was in the employ of Boadi at the time of the accident, but that he was then engaged in his regular work as such employee. Boadi was not subject to the provisions of the compensation act, and that act provides (sec. 2394—3) that an employer subject to the provisions of the act shall be liable for compensation to an employee of a contractor or subcontractor under him who is not subject to the act in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

The city of *Milwaukee* is subject to the provisions of the act, and this provision plainly made the claimant here the employee of the city while carrying out Boadi's contract with the city to the same extent that he was an employee of Boadi, so far as the purposes of the compensation act are concerned. So there can be no doubt of the existence of the

relation of employer and employee within the meaning of the compensation act at the time of the accident. That the claimant was then performing service growing out of and incidental to his employment seems equally beyond doubt. He was taking the garbage collection equipment, part of which belonged to the city, to its usual place of storage and care so that it should be ready for the work of the following day. We can hardly conceive of a service which grows out of and is incidental to his employment as a garbage collector if this is not such a service.

By the Court.—Judgment affirmed.

SHARKEY, Respondent, vs. SHURMAN and another, imp., Appellants.

November 7—December 2, 1919.

Negligence: Driver jumping from wagon: Evidence: Appeal: Review of verdict.

1. A verdict approved by the trial court must be sustained on appeal if there is any credible evidence to support it.
2. A finding of negligence cannot rest upon mere conjecture.
3. A delivery boy, driving a horse and wagon which his employer had hired from a public livery stable, who jumped from the vehicle when a line broke after the right thill fell from the axle, was not negligent in what he did, and, the jury having found no negligence on the part of the liveryman in letting out the rig or the employer in using it, a person who was run down by the horse and wagon could not recover from the employer.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The defendants *Shurman* are copartners in a general retail grocery business in the city of Fond du Lac. The defendant Sheridan is the owner and keeper of a public livery stable in said city. One Clarence Miller was in the employ of the defendants *Shurman,* and on the 18th day of June,

1917, was driving, on one of the streets of Fond du Lac, a horse and delivery wagon rented from the defendant Sheridan. The fastening which held the thill to the wagon became loosened on one side and the thill dropped down. The driver endeavored to stop the horse, when one of the lines broke. He then jumped from the wagon, the horse ran down the street, onto the sidewalk, and injured the plaintiff. The jury found: (1) That the device for fastening the right thill to the axle was in a reasonably safe condition at the time the defendant Sheridan let out the rig to the defendants *Shurman* on the day of the injury. (2) That the line that broke was in a reasonably safe condition at that time. (3) That the device for fastening the right thill to the axle was *not* in a reasonably safe condition at the time the thill fell down. (4) That the defendants *Shurman* used ordinary care in permitting the device to get in the unsafe condition. (5) That the driver did not use ordinary care in doing as he did when the thill fell down. (6) That the want of ordinary care on the part of the driver was the proximate cause of the plaintiff's injury. (7) Assessed the plaintiff's damages at the sum of $491.12. Judgment was rendered for the plaintiff upon the verdict, and the defendants *Shurman* appeal.

The cause was submitted for the appellants on the brief of *R. L. Morse,* and for the respondent on that of *Reilly & O'Brien,* all of Fond du Lac.

ROSENBERRY, J. The only question raised upon this appeal is whether or not there is evidence sufficient to sustain the finding that the driver was guilty of a lack of ordinary care in doing as he did at the time the thill fell down. The verdict having been approved by the trial court, it must be sustained if there is any credible evidence to support it.

It appears that the first event in the series of events which resulted in the injury of the plaintiff was the falling down

of the thill. The jury by its verdict negatived negligence on the part of the liveryman in letting out the rig and of the defendants *Shurman* in using the rig in the condition in which it was. Whatever was done by the driver was done by him in the presence of immediate and great danger. In his effort to stop the horse, the line, which the jury found was in a reasonably safe condition, broke. While the line was found wound around the wheel, there is no evidence to show that the line broke after the driver jumped. We then have the situation of the driver on the wagon, with the thill fastening on the right side loose, one line broken, and the horse proceeding down the street at a rapid rate of speed. The court instructed the jury as follows:

"You will also consider that when one is suddenly put in a position of danger requiring one to act quickly and determine his course of conduct in order to avoid injury to others or to himself, it is not necessary that he take the course that in retrospect seems would have been wisest or safest. If the boy exercised his own judgment as to the best means of avoiding injury, and acted upon it, that is sufficient, although it now seems likely that had he acted otherwise he might have avoided injury to the plaintiff."

This is a correct statement of the law, but respondent contends it is not applicable for the reason that the dangerous situation in which the driver found himself was of his own creation. We find no evidence in the record to sustain that allegation. In fact the verdict of the jury plainly negatives that conclusion. The dangerous situation arose when the thill fell down. The driver was not to blame for that. While it may be that had the driver clung to the single line he might have avoided an injury to the plaintiff, such conduct might well have resulted in injury to someone else as well as to himself. We find nothing in the record to show that the driver did not do what an ordinarily prudent person in the same circumstances would have done. The jury have found no negligence on the part of the defendants *Shurman* in using the thill in the condition in which they

received it from the liveryman. The dangerous situation having arisen without negligence either on the part of the liveryman in letting out the rig or the defendants *Shurman* in its use, we find no evidence upon which the finding that the driver was negligent in doing as he did at the time of the accident can be based. It does not appear that even had the very highest degree of skill and care been used an accident would have been prevented. It is not sufficient to say that it might have been prevented. A finding of negligence cannot rest upon mere conjecture. *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729.

By the Court.—Judgment reversed, with directions to dismiss the complaint.

FRANK, Respondent, vs. FROST, Appellant.

November 7—December 2, 1919.

Accord and satisfaction: Retention of check without cashing: Interest.

1. Where plaintiff bought seed corn of defendant subject to test, which resulted in its rejection, but contracted to buy a less amount at a reduced price, and defendant sent plaintiff his check for the difference between the price of the corn and bags purchased and the amount previously received from plaintiff, the retention of the check by plaintiff, without cashing it (its tender back to defendant having been refused on a subsequent date), was not a completed accord and satisfaction as pleaded by defendant.
2. Where plaintiff had an admitted claim against defendant for the difference between what he owed defendant and what had been previously paid, and no payment was made into court by defendant of the amount or any part thereof, and no attempt was made to comply with Circuit Court Rule XV or sec. 4266, Stats., as to tender, and no offer of judgment was made by defendant under sec. 2789, plaintiff's retention of the check merely defeated any claim for interest by him.

APPEAL from a judgment of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

March 5, 1918, the plaintiff paid defendant $110 for ten bushels of seed corn to be subsequently delivered if upon test it was at least ninety per cent. good. The tests made showed less than ninety per cent. Defendant then offered to reduce the price to $8 per bushel for the eight bushels he still had left, having sold two bushels to another person.

On April 3d the parties met and defendant's version is that he offered to return the $110, but they agreed that the plaintiff was to take the remaining eight bushels at $8 per bushel, no further test to be made, the seed corn to be delivered by defendant at a designated place, and defendant was to purchase, if possible, certain other seed corn for plaintiff with the balance of the $110. Plaintiff testified that this agreement was that he would not take the eight bushels unless the same came up to a specified test; that such test was made and the corn failed to meet such requirement.

It is undisputed that the eight bushels of corn were delivered by defendant at the designated place for the plaintiff and remained there until the time of the trial. Defendant was unable to obtain other seed corn for plaintiff.

April 29th defendant wrote plaintiff refusing to take the seed corn, and relied upon the agreement of April 3d. He inclosed a check for $44, being for the difference between $110 paid and $64 for eight bushels at $8 per bushel, with a charge of $2 for four bags. The check bore upon its face the words "For difference on seed corn and bags." This check was not cashed by plaintiff and was retained by him until the time of trial and then tendered into court and is now a part of the record.

May 2d plaintiff's attorney wrote defendant reciting the receiving of the check for $44 and demanding a check for the balance of $66 unless defendant would furnish seed corn of the tested quality agreed upon in March. A similar demand was made on May 14th. August 2d, at a personal interview, the plaintiff offered to return to defendant the $44 check, but such offer was then refused. Thereupon

the plaintiff commenced this action to recover the $110 with interest, together with another item not material here.

Defendant pleaded that the parties had compromised, adjusted, and settled the matter between them, that the settlement had been executed, and that the plaintiff received and accepted the sum paid to him in settlement of this dispute; such alleged settlement being based upon the transaction with the $44 check above specified.

The court submitted a special verdict of one question to the jury, which was answered by them to the effect that the plaintiff did agree with the defendant, at the interview on April 3d, to take the remaining eight bushels of seed corn at $8 per bushel; this being in accord with defendant's version of the transaction.

Motions were made by the respective parties thereupon for judgment, and the trial court granted plaintiff's motion. From a judgment for said $44 without interest, together with costs of $45.93, the defendant appealed.

For the appellant there was a brief by *Lehner & Lehner* of Oconto Falls, and oral argument by *Philip Lehner* of Princeton.

W. C. O'Connell of Fox Lake, for the respondent.

ESCHWEILER, J. The effect of the verdict in this case went no further than to relieve the defendant from any liability upon the one disputed issue as to whether or not there was an outright purchase of the eight bushels at $8 per bushel. Whether this arrangement on April 3d was an entirely new contract or a modification of the original one is immaterial. The court below, therefore, rightly held that under the verdict and the undisputed facts and circumstances the retention of the $44 check from April 29th until its tender back was refused by defendant on August 2d was not such a completed accord and satisfaction as was pleaded by defendant. Had the check been cashed and the money retained by plaintiff there would have been force in

defendant's contention. *Nassoiy v. Tomlinson,* 148 N. Y. 326, 331, 42 N. E. 715; *Swindell v. Youngstown S. & T. Co.* 230 Fed. 438, 443.

No payment was made into court by defendant of the $44 or any part thereof, or any attempt made to comply with the provisions of Circuit Court Rule XV or of sec. 4266, Stats., as to tender. No offer of judgment was made under sec. 2789, Stats. It was therefore properly held that such retention of the check had no further effect on the rights of the parties than to defeat any claim for interest. *Pahl v. Komorowski,* 168 Wis. 553, 556, 170 N. W. 950; *Weigell v. Gregg,* 161 Wis. 413, 420, 154 N. W. 645. Such effect was given to it by the judgment below, and we can find no error in the record.

By the Court.—Judgment affirmed.

LAPPLEY, Plaintiff in error, vs. THE STATE, Defendant in error.

November 7—December 2, 1919.

Perjury: In verifying complaint in civil action: Complaint as evidence: Criminal law: Evidence: Forged receipts showing similarity of handwriting: Instructions invading province of jury.

1. A complaint in a civil action pending in a court having jurisdiction to hear the cause is a material matter in the proceeding, and an oath verifying it, being one in regard to a matter before a court and authorized by law, will sustain a prosecution for perjury if wilfully and falsely and corruptly made.
2. The complaint itself was admissible in evidence to show that it was a verified pleading and that defendant swore that the facts stated therein were true, it not being received "as evidence of a fact admitted or alleged in such pleading," within sec. 2665, Stats.
3. In a prosecution for perjury, copies of an alleged forged receipt made by defendant at the direction of a court commissioner in an adverse examination under sec. 4096 were prop-

erly submitted to a handwriting expert and to the jury; and it was proper to receive the expert's opinion as to their similarity.

4. An instruction which is plainly limited to certain material facts is not erroneous as charging that all facts necessary to prove the crime were undisputed.
5. It is not error for the court to state to the jury that certain material facts are proven beyond controversy when they are established by the undisputed evidence.

ERROR to review a judgment of the municipal court of Milwaukee county: GEORGE CLEMENTSON, Judge. *Affirmed.*

Plaintiff in error (defendant) was tried and convicted of perjury and brings error to reverse this judgment.

On December 30, 1892, defendant and his wife, Wilhelmina Lappley, borrowed from George Hook, the complainant and plaintiff in the mortgage foreclosure proceeding out of which this action arose, the sum of $800, giving their note for that amount. At the same time a real-estate mortgage securing the payment of the note was given to George Hook and signed by *Charles Lappley* and Wilhelmina Lappley, dated December 30, 1892. The complainant, George Hook, testifies that the note was never paid; that no claim was ever made by the defendant that the note was paid until some time in July, 1914, after foreclosure proceedings had been commenced and when the defendant asked for an extension of time from the complainant's attorney. The defendant admits paying interest on the note up to the year 1914, but claims that he discovered in July of that year that the note had been paid on June 30, 1900, by his wife. The wife became insane shortly after that date and was committed to an insane asylum in October, 1900. He admits that she experienced lucid periods up to the time of her death in 1918, and that he conversed with her in regard to business matters a number of times, but claims that she never told him of having paid the note in 1900, and that he knew nothing of the matter until he found a receipt bearing

the date June 30, 1900, signed by George H. Hook. Mr. Hook denied that the receipt, either signature or body, is in his handwriting, or that he had written it, or that it was in the handwriting of his wife or his children or any one employed as his agent.

On January 30, 1915, the plaintiff, Mr. Hook, was awarded judgment in the foreclosure proceeding against the defendant, which judgment was entered on the same day. On January 16, 1916, defendant instituted a proceeding in connection with the foreclosure action by verified petition, setting up the alleged receipt and payment of the note and praying that the foreclosure judgment be vacated and set aside. By stipulation this motion was dismissed upon its merits, and on September 26, 1918, the defendant commenced a civil action by swearing to a complaint which is the basis for this prosecution for perjury. This civil action is based upon the same alleged receipt from George Hook. On October 5, 1918, this criminal action of perjury against *Charles Lappley* was commenced.

The case was tried before the court and a jury and the defendant was found guilty. He was sentenced to serve a term of three years in the house of correction of Milwaukee county, which judgment he now seeks to reverse.

For the plaintiff in error there was a brief by *Gugel & Kline* of Milwaukee, and oral argument by *F. H. Gugel.*

For the defendant in error there was a brief by the *Attorney General* and *Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney, and oral argument by *Mr. Zabel.*

SIEBECKER, J. It is contended that the perjury charged in the information does not constitute a crime within the provisions of sec. 4471, Stats., upon the ground that perjury cannot be committed in verifying a pleading. The statute provides:

"Any person, being lawfully required to depose the truth,

on his oath, . . . legally administered, who shall wilfully and corruptly swear . . . to any matter or thing respecting which such oath . . . is by law authorized or required, . . . shall be deemed guilty of the crime of perjury; . . ."

No claim is made that the oath was not administered by an officer as charged. But it is argued that the verification by defendant of his complaint as a pleading in the civil action on which the charge is predicated was a wholly immaterial oath within the contemplation of the perjury statute, because under sec. 2665 pleadings may or may not be verified, and, whether verified or not, the facts therein stated to which defendant swore do not by operation of law make such oath a material matter or thing in such action. This claim wholly disregards the terms and significance of sec. 4471. A complaint in a civil action pending in a court having jurisdiction to hear the cause is a material matter in the proceeding, and an oath verifying it is one in regard to a matter before a court and is authorized by law. The facts of this case show that the verification by defendant of this complaint in question will in law sustain a prosecution for perjury under our statute if the defendant wilfully and falsely and corruptly swore to the material facts stated therein. *Comm. v. Kimball,* 108 Mass. 473; *Jones v. Ludlum,* 74 N. Y. 61; McClain, Crim. Law, sec. 859; *People v. Christopher,* 4 Hun, 805; *Taylor v. Robinson,* 26 Wis. 545.

It is claimed that the court erred in admitting the complaint and the verification thereof on which the charge of perjury is predicated as evidence in this criminal prosecution. The point is made that the provisions of sec. 2665, Stats., make it incompetent. The provision relied on reads: "And no pleading can be used in a criminal prosecution against the party as evidence of a fact admitted or alleged in such pleading." The complaint was not received as "evidence of a fact admitted or alleged," but was received to show that it was a verified pleading and that defendant swore that the facts stated therein were true.

Proof of the truth or the falsity of the facts thus sworn to in the complaint was required to be made by evidence other than by the contents of the complaint. Such use of the complaint is using it as evidence to show that the defendant did depose to the truth on his oath of the material matters therein stated in a proceeding before a court.

An exception is urged to the reception in evidence of the alleged forged receipt in connection with copies thereof that the defendant had made at the direction of the court commissioner in an adverse examination of him under sec. 4096, Stats., in a proceeding to vacate the judgment of foreclosure in the action of Hook v. Lappley. The defendant was there required to produce the alleged forged receipt showing payment of the mortgage, and upon its production he was directed by the commissioner to make copies of the receipt in the presence of the commissioner and counsel. These copies were offered in evidence and used as the genuine handwriting of the defendant in the trial of this criminal action and were so used and submitted to the witness called as an expert on handwriting and were submitted to the jury. We discover no error in so receiving and using these copies, nor was it error for the court to receive the expert's opinion as to the similarity of the handwriting of these copies and the alleged forged receipt. We think the expert was properly held by the court to be qualified to give his opinion in the matters elicited from him.

An objection is urged to the following instruction given the jury:

"There is no question but that the oath was administered properly in a legal proceeding by an officer authorized to administer it, and that all the elements of perjury, so far as the court and officer administering the oath and the character of the proceeding in which it was administered is required—every such requirement is indisputably proved by the evidence of the case."

It is averred that this instruction conveyed the idea to the jury that all the facts necessary to prove the crime of per-

jury charged were undisputed. We cannot so regard the instruction; it is plainly limited to refer to certain material facts as undisputed in the case, and the record sustains the court in this assumption. It is therefore not an objectionable instruction in view of the evidence in the case. Furthermore, the court fully brought to the attention of the jury in clear and explicit terms the other issues of fact which they were required to determine upon the evidence in the case to justify them in finding the defendant guilty of the crime charged. It is not error to state to the jury that certain material facts are proven beyond controversy when they are established by the undisputed evidence. *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

We have examined the exceptions called to our attention and find no reversible error in the record. The defendant had a fair and legal trial, and the conviction must stand.

By the Court.—The judgment is affirmed.

CASES DETERMINED

AT THE

January Term, 1920.

CRANBERRY CREEK DRAINAGE DISTRICT, Respondent, vs. ELM LAKE CRANBERRY COMPANY and others, Appellants.

October 7, 1919—January 13, 1920.

Drains: Purpose of drainage districts: Power of district to sue: May invoke invalidity of defenses: Rights of cranberry growers to divert water: Wrongful diversion of water into drain under grant of canal rights: Damages: Diverting natural watercourses: Prescriptive right.

1. Under sec. 1379—11, Stats. 1917, drainage districts are created for the purpose of promoting the public health or welfare and for the drainage of land, and are invalid if created for the drainage of land alone.
2. In view of the broad powers expressly granted to drainage districts by sec. 1379—14 and of the duty of a drainage district to drain land for the promotion of the public health and welfare, a drainage district can maintain any action to remove any unlawful obstruction to the full discharge of its duty; and it is immaterial that private property owners within the district may benefit by the action.
3. Since a drainage district may maintain an action where it is essential to the full discharge of its duty and functions, it may invoke the invalidity of any defense thereto.
4. Natural watercourses cannot be lawfully diverted or surface water be collected and discharged upon a lower landowner to his damage in the absence of a prescriptive or statutory right thereto.
5. Twenty years' continuous user is necessary to gain a prescriptive right to divert natural watercourses or collect surface water and discharge it upon a lower landowner; and if the canal carrying the waters has been materially enlarged, to gain the right by prescription to divert the increased flow caused by such enlargement would require user for twenty years after the enlargement.
6. In an action by a drainage district to enjoin the diversion of water from another watershed into the drainage district, the rights granted to cranberry growers by secs. 1472–1478 are

subordinate to rights involving the public health or welfare, and the cranberry growers cannot justify the diversion thereunder as against the drainage district.

7. Persons granted the right, by ch. 265, Laws 1893, as amended by ch. 80, Laws 1895, to maintain and build a canal from Hemlock creek to Cranberry creek for the purposes of transportation, irrigation, and drainage, were not entitled to build a canal only part way and then discharge water from Hemlock creek into the Cranberry creek drainage district, they having made no honest attempt to comply with the conditions of the grant.

8. Evidence that the amount of water diverted caused and will cause a material increase in the amount of water the ditches have to carry, and that such an increase is more marked in periods of average flow, is sufficient to sustain a finding of substantial damage.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action for an injunction, begun in 1913, to restrain defendants from diverting water from Hemlock and Hay creeks and discharging the same into plaintiff's drainage district. Plaintiff is a drainage district corporation organized in 1906 under the provisions of secs. 1379—11 to 1379—39 inclusive of the Statutes of 1898 and the amendments thereof. Its ditches were not dug till about the year 1908. In 1901 the defendants dug a canal from Hemlock and Hay creeks to the Cranberry creek watershed, and since that time they have diverted waters from said creeks lying in a watershed different from that of Cranberry creek, which forms the watershed of the plaintiff district, and have discharged the same into the Cranberry creek watershed. Their canal was materially enlarged in 1910, since which time they have continued to divert much larger quantities of water from said Hemlock and Hay creeks and to discharge the same into the Cranberry creek watershed. Plaintiff claims that its ditches have been damaged by reason of the alleged unlawful discharge of such waters into them; that it has no adequate remedy at law and therefore brings a suit in equity for an injunction.

The defendants denied that plaintiff was injured by the discharge of the diverted waters; alleged that under the provisions of secs. 1472 to 1478 inclusive of the Statutes of 1898, known as the cranberry law, they are entitled to so divert and discharge the waters of Hemlock and Hay creeks. They further allege that under the provisions of ch. 265, Laws 1893, as amended by ch. 80, Laws 1895, they have the lawful authority to so divert and discharge said waters, and they pleaded the statute of limitations prescribed in secs. 4207, 4208, 4209, 4211, and 4215, Stats. 1917, in defense of their right to so divert and discharge the waters of Hemlock and Hay creeks.

The court found that plaintiff's ditches were damaged by the diversion and discharge of the waters complained of; that it had no adequate remedy at law; that defendants had no right to divert and discharge said waters under any statute pleaded or under any prescribed right gained from continued user for the requisite period, and entered judgment against the appealing defendants restraining them from diverting the waters from Hemlock creek and from Hay creek without returning such diverted waters to the said Hemlock and Hay creeks before they reach plaintiff's district or its ditches. It also awarded costs and $50 damages against them.

For the appellants there was a brief by *Goggins, Brazeau & Goggins* of Grand Rapids, and oral argument by *B. R. Goggins.*

For the respondent there was a brief by *B. M. Vaughan* of Grand Rapids, attorney, and a separate brief by *Daniel H. Grady* of Portage, of counsel; and the cause was argued orally by *Mr. Vaughan.*

The following opinion was filed November 4, 1919:

VINJE, J. The defendants' contentions necessarily involved in disposing of the appeal are: (1) plaintiff cannot maintain the action; (2) it cannot invoke the invalidity of

the laws under which they claim the right to divert and discharge the waters; (3) they have gained a prescriptive right to their use of the waters; (4) they have such right under the provisions of secs. 1472 to 1478 inclusive of the Statutes of 1898; (5) they have such right under ch. 265, Laws 1893, as amended by ch. 80, Laws 1895; and (6) no damages are shown and hence no injunction should issue. These contentions will be considered in the order stated.

1. Drainage districts are created for the purpose of promoting the public health or welfare and for the drainage of land. Sec. 1379—11, Stats. 1917. If created for the drainage of land alone they are invalid. *In re Theresa D. Dist.* 90 Wis. 301, 63 N. W. 288. It is because of the public function they perform in promoting the public health or welfare that they are lawfully given the right of eminent domain. *Ibid.* When the commissioners are appointed the "drainage district shall be a fully organized drainage district with the right to sue and be sued and with all the rights and powers in the drainage district law to such districts given, together with all the usual powers of a public corporation." Sec. 1379—14, Stats. 1917. In view of these broad powers expressly granted to the district by statute and in view of its duty to drain land for the promotion of the public health and welfare, it follows as a natural consequence that the district can maintain any action to remove any unlawful obstruction to the full discharge of its duty. *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist.* 135 Wis. 228, 230, 115 N. W. 825. If defendants without right increase the burden of drainage or render drainage less effective, the district may lawfully maintain an action to stop them from so doing. Its right to maintain actions is coextensive with its duties and functions. The legislature expressly clothed it with power to enforce all rights essential to fully secure the objects of its creation. The fact that private property owners within the district may benefit by the action is immaterial. That is a mere

incident of the suit which cannot militate against the power of the district to secure the lawful enforcement of its rights.

2. Since the plaintiff may maintain the action because it is essential to the full discharge of its duties and functions, it follows as a necessary corollary that it may invoke the invalidity of any defense thereto. To hold otherwise were to deprive it of the power to assert its rights and duties, and to leave it helpless as against defenses in form but not in fact.

3. Hay and Hemlock creeks are natural watercourses within one watershed and Cranberry creek is a natural watercourse within another watershed. It is well settled that natural watercourses cannot lawfully be diverted or surface water be collected and discharged upon a lower landowner to his damage in the absence of a prescriptive or statutory right thereto. *Pettigrew v. Evansville,* 25 Wis. 223; *Harvie v. Caledonia,* 161 Wis. 314, 154 N. W. 383. Defendants claim a prescriptive right. But it appears that their canal was first dug in 1901 and this action was begun in 1913, so there has not been the continuous twenty years' user requisite for the gaining of such right. *Green Bay & M. C. Co. v. Kaukauna W. P. Co.* 90 Wis. 370, 402, 61 N. W. 1121, 63 N. W. 1019; *Diana Shooting Club v. Lamoreux,* 114 Wis. 44, 56, 89 N. W. 880. Moreover, the canal was materially enlarged in 1910, and for the increased flow caused by such enlargement a new prescriptive right would have to be acquired. *Green Bay & M. C. Co. v. Kaukauna W. P. Co., supra; Shaughnessey v. Leary,* 162 Mass. 108, 38 N. E. 197.

4. Secs. 1472 to 1478, commonly known as the cranberry law, grant to any person owning land adapted to the culture of cranberries the right to maintain dams on his own land and construct and maintain across and through any lands such drains and ditches as shall be necessary for bringing and flooding or draining and carrying off the water from such cranberry-growing lands, or for the purpose of

irrigation, fertilization, and drainage of any other lands owned by such person. The statute also provides for the payment of damages caused by the maintenance of such dams, drains, or ditches, the appointment of arbitrators to assess the damages, etc. In *Ramsdale v. Foote,* 55 Wis. 557, 13 N. W. 557, the question of the validity of this law was expressly reserved, and such reservation is now again made because such question is not necessary to a decision of the precise point presented. Conceding the law is valid as against private persons or private interests, it does not follow that it can be successfully invoked as against public interests. As before stated, plaintiff's drainage is for the promotion of the public health or welfare, and it is clear that whatever rights were granted to the owners of lands adapted to cranberry culture they were not paramount to rights involving the public health or welfare, but subordinate thereto. That being so, the defendants cannot justify under said law as against the plaintiff. *Green Bay & M. C. Co. v. Kaukauna W. P. Co.* 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019.

5. Ch. 265, Laws 1893, as amended by ch. 80, Laws 1895, grants to defendants' predecessors in title the right to build and maintain a canal from Hemlock creek to Cranberry creek for the purposes of transportation, irrigation, and drainage, which canal shall be deep enough for boats drawing not to exceed twelve inches of water and to draw not to exceed one half the flow of Hemlock creek for such purpose. They claim that under the act they are entitled to draw water from Hemlock creek and discharge it into Cranberry creek. We assume but do not decide that the act is a valid one. It appears, however, that the canal actually constructed is only a small portion of the whole distance and that it has never been of sufficient depth to be capable of sustaining navigation for the size boats described from May 1st to October 20th of each year as the law prescribes; that in fact it has never been used for transportation of

goods at all. The defendants therefore stand in the same position as the plaintiff in *Sauntry v. Laird, Norton Co.* 100 Wis. 146, 75 N. W. 985. There plaintiff, upon building and maintaining three dams in aid of navigation, was authorized to collect toll on logs driven down the St. Croix river. He had built two dams and the evidence was quite conclusive that the third dam would have been useless, but the court said: "We have no authority to infer from extrinsic circumstances that a case for which the words of the statute expressly provide shall be exempted from its operation." Defendants are seeking to justify their action under a legislative enactment that they have not substantially complied with. This they cannot do. The legislature gave them certain rights upon certain conditions. They have made no honest attempt to comply with such conditions. They have constructed only a portion of the required canal, which portion is fitted for but part of the purposes for which it was to be constructed. It is wholly unsuitable for transportation and has never been used for such purposes as contemplated by the act. They therefore cannot justify under it.

6. As stated by the trial judge in his decision of the case, the precise amount of damages caused in the past and that will be caused in future by reason of the diversion of water from Hemlock and Hay creeks and the discharging of the same into plaintiff's ditches is hard to estimate in money. He found past damages to be $50 and that future damages would result if defendants were not restrained. They argue that there is no evidence to sustain the finding as to damages; that since the water taken from Hemlock and Hay creeks is mingled with that of water from Cranberry creek, it is impossible to say that water from the former creeks causes damage; that owing to floods from Cranberry creek that recurrently cause damage, the additional water diverted by defendants becomes negligible. There is, however, evidence that the amount of water diverted causes a material

increase in the amount of water the ditches have to carry and that such increase is more marked in periods of average flow when there is need of water by defendants and when they can get it from Hemlock and Hay creeks. It is undisputed that since 1910, when the canal was enlarged, considerable quantities of water are annually taken from said creeks and discharged into the Cranberry creek watershed. It follows as a natural consequence that by reason of such increased flow plaintiff's ditches have to carry more water, and that they will suffer more from erosion, and that the higher the water in them the less perfectly they drain the adjoining land. For these reasons we think the finding as to substantial damages is sustained by the evidence and that the court properly granted the judgment appealed from. *Miller v. Hoeschler,* 121 Wis. 558, 99 N. W. 228; *Geuder, Paeschke & Frey Co. v. Milwaukee,* 147 Wis. 491, 133 N. W. 835.

By the Court.—Judgment affirmed.

ROSENBERRY and ESCHWEILER, JJ., dissent.

The appellants moved for a rehearing.

In support of the motion there was a brief by *Goggins, Brazeau & Goggins* of Grand Rapids.

In opposition thereto there was a brief by *B. M. Vaughan* of Grand Rapids.

The following opinion was filed January 13, 1920:

By the Court.—The mandate is modified to read:

Judgment affirmed, but with leave granted the defendants, on the record already made and such further evidence as either party may deem necessary, to apply to the trial court, within sixty days from the filing of the *remittitur* herein, for an order opening the judgment for the purpose of determining whether there are ways and means by which the defendants may use the waters complained of without

Proof of the truth or the falsity of the facts thus sworn to in the complaint was required to be made by evidence other than by the contents of the complaint. Such use of the complaint is using it as evidence to show that the defendant did depose to the truth on his oath of the material matters therein stated in a proceeding before a court.

An exception is urged to the reception in evidence of the alleged forged receipt in connection with copies thereof that the defendant had made at the direction of the court commissioner in an adverse examination of him under sec. 4096, Stats., in a proceeding to vacate the judgment of foreclosure in the action of Hook v. Lappley. The defendant was there required to produce the alleged forged receipt showing payment of the mortgage, and upon its production he was directed by the commissioner to make copies of the receipt in the presence of the commissioner and counsel. These copies were offered in evidence and used as the genuine handwriting of the defendant in the trial of this criminal action and were so used and submitted to the witness called as an expert on handwriting and were submitted to the jury. We discover no error in so receiving and using these copies, nor was it error for the court to receive the expert's opinion as to the similarity of the handwriting of these copies and the alleged forged receipt. We think the expert was properly held by the court to be qualified to give his opinion in the matters elicited from him.

An objection is urged to the following instruction given the jury:

"There is no question but that the oath was administered properly in a legal proceeding by an officer authorized to administer it, and that all the elements of perjury, so far as the court and officer administering the oath and the character of the proceeding in which it was administered is required—every such requirement is indisputably proved by the evidence of the case."

It is averred that this instruction conveyed the idea to the jury that all the facts necessary to prove the crime of per-

jury charged were undisputed. We cannot so regard the instruction; it is plainly limited to refer to certain material facts as undisputed in the case, and the record sustains the court in this assumption. It is therefore not an objectionable instruction in view of the evidence in the case. Furthermore, the court fully brought to the attention of the jury in clear and explicit terms the other issues of fact which they were required to determine upon the evidence in the case to justify them in finding the defendant guilty of the crime charged. It is not error to state to the jury that certain material facts are proven beyond controversy when they are established by the undisputed evidence. *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

We have examined the exceptions called to our attention and find no reversible error in the record. The defendant had a fair and legal trial, and the conviction must stand.

By the Court.—The judgment is affirmed.

CASES DETERMINED

AT THE

January Term, 1920.

CRANBERRY CREEK DRAINAGE DISTRICT, Respondent, vs. ELM LAKE CRANBERRY COMPANY and others, Appellants.

October 7, 1919—January 13, 1920.

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1. Under sec. 1379—11, Stats. 1917, drainage districts are created for the purpose of promoting the public health or welfare and for the drainage of land, and are invalid if created for the drainage of land alone.
2. In view of the broad powers expressly granted to drainage districts by sec. 1379—14 and of the duty of a drainage district to drain land for the promotion of the public health and welfare, a drainage district can maintain any action to remove any unlawful obstruction to the full discharge of its duty; and it is immaterial that private property owners within the district may benefit by the action.
3. Since a drainage district may maintain an action where it is essential to the full discharge of its duty and functions, it may invoke the invalidity of any defense thereto.
4. Natural watercourses cannot be lawfully diverted or surface water be collected and discharged upon a lower landowner to his damage in the absence of a prescriptive or statutory right thereto.
5. Twenty years' continuous user is necessary to gain a prescriptive right to divert natural watercourses or collect surface water and discharge it upon a lower landowner; and if the canal carrying the waters has been materially enlarged, to gain the right by prescription to divert the increased flow caused by such enlargement would require user for twenty years after the enlargement.
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subordinate to rights involving the public health or welfare, and the cranberry growers cannot justify the diversion thereunder as against the drainage district.

7. Persons granted the right, by ch. 265, Laws 1893, as amended by ch. 80, Laws 1895, to maintain and build a canal from Hemlock creek to Cranberry creek for the purposes of transportation, irrigation, and drainage, were not entitled to build a canal only part way and then discharge water from Hemlock creek into the Cranberry creek drainage district, they having made no honest attempt to comply with the conditions of the grant.

8. Evidence that the amount of water diverted caused and will cause a material increase in the amount of water the ditches have to carry, and that such an increase is more marked in periods of average flow, is sufficient to sustain a finding of substantial damage.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action for an injunction, begun in 1913, to restrain defendants from diverting water from Hemlock and Hay creeks and discharging the same into plaintiff's drainage district. Plaintiff is a drainage district corporation organized in 1906 under the provisions of secs. 1379—11 to 1379—39 inclusive of the Statutes of 1898 and the amendments thereof. Its ditches were not dug till about the year 1908. In 1901 the defendants dug a canal from Hemlock and Hay creeks to the Cranberry creek watershed, and since that time they have diverted waters from said creeks lying in a watershed different from that of Cranberry creek, which forms the watershed of the plaintiff district, and have discharged the same into the Cranberry creek watershed. Their canal was materially enlarged in 1910, since which time they have continued to divert much larger quantities of water from said Hemlock and Hay creeks and to discharge the same into the Cranberry creek watershed. Plaintiff claims that its ditches have been damaged by reason of the alleged unlawful discharge of such waters into them; that it has no adequate remedy at law and therefore brings a suit in equity for an injunction.

was making trips to Polar and receiving treatment in the physician's office.

The purpose of the company to thus limit its liability for full indemnity is made more plain when we consider the immediately following provision in the policy for partial indemnity. Under that provision the insured is entitled to partial indemnity "for the period not exceeding two consecutive months immediately following said confinement, during which the insured shall be regularly and personally attended by such physician, and wholly and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation." Now the question arises, If the period during which the insured was necessarily and continuously confined within his house and therein regularly treated by a physician does not mark the limit of time during which he was entitled to full indemnity, then, under the terms of the policy, when did the term, during which he was entitled to full indemnity, end, and when did the partial indemnity period begin? It will be noticed that in order to entitle him to either full or partial indemnity he must have been wholly and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation solely by reason of such illness. That condition must be present to entitle him either to full or partial indemnity. It was also necessary, in order for him to recover either full or partial indemnity, that he be regularly and personally attended by a physician. What, then, is the feature which distinguishes the full from the partial indemnity period? Manifestly it is the continuous and necessary confinement within the house and treatment therein by a physician.

The indemnity provisions of the policy recognize two degrees of illness: one, when the insured is so ill that he is confined within his house and is therein treated by his physician; the other, when he has so far recovered that he is

able to be outside the house and to receive treatment from his physician at places other than the house. The purpose of these provisions is not difficult to understand. He who is disposed to malinger will grow weary of his simulations more quickly if, in order to enjoy their fruits, he must confine himself within the four walls of his house. The period of convalescence can be more cheerfully prolonged if one be permitted to enjoy the fresh air and sunshine, walk about his yard, take an occasional walk to the neighbors, and make calls at his physician's office. It was for the purpose of discouraging the protraction of illness for the purpose of securing the fruits of the insurance contract that the company limited full indemnity to the period of actual confinement within the house. This may not be a desirable contract, but the company had the right to prescribe the period during which it should be liable for indemnity, as well as the amount thereof. If the contract did not appeal to plaintiff, he was under no obligations to purchase it. The premium rate was no doubt fixed by the character of the liability assumed and, the company having made use of plain and unambiguous words prescribing the period of full liability, the court should not substitute another and different contract for the parties. The court was in error in ordering judgment upon the theory that the plaintiff was entitled to the full indemnity during the six-months period. Judgment should have been ordered for full indemnity for the period of three weeks and partial indemnity for the remainder of the six-months period.

The policy also contains this provision: "Written notice of injury or of sickness on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness." It is claimed by the company that written notice of sickness was not given. The plaintiff testified that about the 25th

of July he instructed Dr. Westphal to notify the *Midland Casualty Company* that he was ill. Dr. Westphal testified: "I gave written notice to the *Midland Casualty Company* of plaintiff's illness on July 25, 1917. *Reeves* gave me his papers and asked me to complete them for him. The notice was made out on blanks furnished by the company. I filled out and signed such notice. I mailed it to the *Midland Casualty Company* at Green Bay, Wisconsin." The president of the company testified that the defendant received no notice of sickness from the plaintiff to which Dr. Westphal testified. Unless the notice testified to by Dr. Westphal was given, the company did not receive notice of plaintiff's sickness within the time required by the provisions of the policy. The question is whether upon this state of the testimony the jury was warranted in finding that proper notice had been given.

It is contended that the bare testimony of Dr. Westphal to the effect that he mailed the notice to the company at Green Bay, Wisconsin, is not sufficient proof of mailing, and that in order to constitute proof of mailing it was essential on the part of the plaintiff to specifically show that the notice was inclosed in an envelope or wrapper, addressed to the defendant, and was deposited in the postoffice with the postage thereon duly paid. This contention is no doubt supported by much authority, but it seems to us that this rule is too technical to be adopted by a court as an original proposition in this day. Such a rule dignifies form rather than substance. The term "mailing" or "mailed" has a well understood meaning. If it is said to a business man, "I mailed a letter," he assumes that the letter was inclosed in an envelope, properly addressed, deposited in the postoffice with the postage duly prepaid, and he will act upon that assumption in conducting the most important business transactions. When the same expression comes from the mouth of a witness in a court of justice, why should the

court hesitate to accord to the expression its usual and customary significance?—especially in view of the fact that the opposing party has the right to cross-examine him with respect to every detail essential to constitute a complete mailing. We hold that the testimony of Dr. Westphal to the effect that he mailed the notice to the company at Green Bay is sufficient proof of mailing. From the proof of mailing a presumption arises that it was received by the company. True, the president of the company testified that the notice was not received. We do not understand, however, that such testimony operates as a conclusive rebuttal of the presumption arising from the proof of mailing. The presumption, with the evidence of the president of the company, made an issue for the determination of the jury, and upon such evidence the jury found that the notice was given. Its finding in this respect cannot be disturbed.

Another question arises as to whether the proof shows that the notice was sufficient to advise the company of plaintiff's sickness. The policy does not require this notice to contain any specific information. It simply states that the written notice of injury or of sickness on which claim may be based must be given to the company within twenty days after the commencement of disability from such sickness. Dr. Westphal testified that the notice was made out on blanks furnished by the company, that the blanks were filled out by him, and that he signed such notice. We hold the evidence ample to warrant the jury in finding that the notice given complied with the requirements of the policy.

Judgment was ordered and rendered for $180 with interest thereon from the 29th day of January, 1918, amounting to $189.40. This included full indemnity for the full six-months period. Plaintiff should have recovered full indemnity, or $30 per month, for the period of three weeks, or seven-tenths of a month, and half indemnity, or $15 per month, for the remainder of the six-months period, or for

five and three-tenths months, which amounts to $100.50, with interest thereon from the 29th day of January, 1918, amounting in all to $105.50.

By the Court.—The judgment is modified by substituting $105.50 for $189.49, and as so modified is affirmed.

The appellant moved for a rehearing, and the following opinion was filed January 13, 1920:

PER CURIAM. Upon motion for rehearing appellant's attorney calls our attention to material provisions of the policy which were overlooked in computing the amount for which plaintiff should have judgment. The policy provides that no indemnity for sickness disability shall be paid for the first five days of illness and that partial indemnity shall be paid for a period of not exceeding two consecutive months. Therefore, plaintiff was not entitled to indemnity for the first five days of his sickness, nor was he entitled to indemnity for a longer period than two months. He is therefore entitled to full indemnity for the three-weeks period less five days, and partial indemnity for the remainder of the two-months period, amounting in the whole to $47.50.

The motion for rehearing is denied. The mandate herein is modified to read: The judgment appealed from is modified by substituting $47.50 for $189.49, and as so modified is affirmed. No costs allowed on motion for rehearing.

MILLER-PIEHL COMPANY, Respondent, vs. MULLEN and wife, imp., Appellants.

October 10, 1919—January 13, 1920.

Mortgages: Mortgagee chargeable with notice of rights of one in possession: Recognition by grantee of lien of mortgage of grantor: Mechanics' liens: Waiver of lien by acceptance of mortgage.

1. A mortgage of four acres out of a larger tract to a corporation whose predecessor had furnished materials for a building on

such four-acre tract, made by a mortgagor who was out of possession of the four acres and had only record title thereto, having sold to her brother, conveyed no interest in the four acres to the mortgagee, which stood charged with knowledge of the rights of the brother as the real owner in actual possession.

2. A grantee, by accepting with full knowledge and subsequently recording a warranty deed containing the clause "subject to a mortgage," did not thereby so recognize the obligation of the apparent mortgage on the land as to bar him from asserting its invalidity as against his own title in a foreclosure action, such clause not lessening the estate passing to him by the other terms of the deed.

3. Notwithstanding sec. 3317, Stats. 1917, provides that the taking of a note or other evidence of indebtedness shall not destroy a mechanic's lien, by accepting a mortgage securing a promissory note extending the time of payment of the indebtedness to a period beyond which the statute prescribed for the commencement of an action to foreclose the lien, and by including other indebtedness, the lienor waived any subsequent right to assert his lien under the statute, which refers to the taking of a note falling due within the time limited for the commencement of an action to foreclose the lien.

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

Prior to October, 1914, the defendant Ellen McCormick was the owner of forty-five acres of land in the town of Oneida, Outagamie county, upon which was a mortgage of $2,500.

In October, 1914, her husband, M. L. McCormick, who appears to have managed to a considerable extent her business affairs, commenced the erection of a dwelling upon one corner of said tract of land. Building material was furnished by the predecessor and assignor of the plaintiff company to the extent of $887.96 and used in the completing of said building, the last item of which was furnished on December 9, 1914.

The defendant *C. E. Mullen,* brother of Ellen McCormick, had negotiations with the defendant M. L. McCormick for the purchase from said Ellen McCormick of a

certain tract of four acres out of the forty-five acres, including the one acre upon which stood the newly completed dwelling; and such negotiations were with full knowledge and information regarding the right to a lien on behalf of the plaintiff's assignor for the said building materials. The *Mullens* and McCormicks had had previous transactions and then made a settlement and account stated as to their mutual dealings, and agreed, as a part of such negotiations and settlement, that the defendants McCormick were to convey the said premises by warranty deed to the defendant *Mrs. Mullen.* Possession of the four acres appears to have been given by the McCormicks to the *Mullens* about March 1, 1915, they, the *Mullens,* then moving into the house, and, as it appears from the testimony of *Mullen,* farming and occupying the entire four acres from that time on.

June 15, 1915, a claim for a lien was duly filed for the balance due for the materials furnished, of $887.96, but on the one acre only upon which the house in question stood, and in the following November the proper affidavit for renewal of the lien was filed.

On March 18, 1916, as the result of negotiations between the McCormicks and the plaintiff for the purpose of trying to clear up the title to the forty-five acres and to adjust their differences, a mortgage was executed by Mrs. McCormick securing a promissory note due two years after date for the amount of $1,130, which included the amount due for the materials of $887.96 with interest, together with a smaller balance due on some other transaction between them. Five days later a warranty deed was made by Ellen McCormick to the defendant *Mamie Mullen* of the four acres in the usual form, and further providing that said Ellen McCormick did covenant that at the time of the execution of this deed "she is well seised of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and that the same are free and clear from all incumbrances

whatever, subject to a mortgage of $1,130." The mortgage was recorded March 28, 1916. The deed was delivered in May, 1916, and recorded October 4, 1916.

The statutory period within which an action to foreclose a mechanic's lien for the materials furnished might be commenced expired December 9, 1916. This action to foreclose the mortgage of March 18, 1916, was commenced June 18, 1918.

The court found that the defendants *Mullen* accepted the warranty deed with full knowledge of the subsisting mortgage on said premises and that such mortgage became a valid and subsisting first lien against the four acres, and directed judgment of foreclosure of the same, from which judgment the defendants *Mullen* appeal.

For the appellants there were briefs by *E. C. Smith* of Seymour, attorney, and *Minahan & Minahan* of Green Bay, of counsel, and oral argument by *E. R. Minahan.*

For the respondent there was a brief by *Silverwood, Fontaine & McCreery* of Green Bay, and oral argument by *T. P. Silverwood.*

The following opinion was filed November 4, 1919:

ESCHWEILER, J. It appears without dispute that at the time of the execution of the mortgage of March 18, 1916, foreclosed in this action, the plaintiff's assignor had actual knowledge of the fact that the *Mullens* were in possession of the house and premises included in such mortgage, and in the lien filed in June, 1915, and in the renewal thereof in the following November the defendants *Mullen,* as well as the defendants McCormick, were named as being the owners of said premises.

There is some confusion and uncertainty as to just what was the consideration for the conveyance from the McCormicks of the four acres and as to whether or not the one acre or the four acres had been paid for in full and for a fair consideration at the time the *Mullens* entered into pos-

session and at the time of the execution of the mortgage in question. The court was specifically requested by appropriate motion, after the findings had been signed, to make a finding to the effect that full and complete consideration had been paid by the *Mullens* to the McCormicks at the time of taking possession in March, 1915, and refused to make such finding. The findings do determine, however, that negotiations were had for the purchase of the premises by warranty deed and that possession was taken pursuant thereto by the *Mullens*. It further appears without contradiction that *Mullen* cultivated the entire four acres from the time of taking possession of the house.

There is no finding and no testimony to the effect that at the time of the negotiations and agreement between the *Mullens* and the McCormicks for the conveyance of the four acres in question the *Mullens* were to assume or undertake to pay either the claim for the materials furnished in the building of the house or the mortgage in question.

The mortgage, therefore, by Mrs. McCormick, then not the real owner and having only the record title and out of possession, conveyed no interest in the real estate to the mortgagee, who stood charged with knowledge of the rights of the *Mullens* as the real owners and in actual visible possession.

It is urged here as it was in the court below that by the *Mullens* accepting with full knowledge and subsequently recording the warranty deed to them containing the clause "subject to a mortgage of $1,130," they thereby so recognized the obligation of such apparent lien upon the premises as to now be a bar to their asserting its invalidity as against their own title.

We think this point, however, is controlled by the decision of this court in the case of *Bennett v. Keehn*, 67 Wis. 154, 162, 29 N. W. 207, 30 N. W. 112, where the words used were "except a mortgage," instead of the phrase, as here, "subject to a mortgage;" the language there used

being held not enough to prevent a grantee of the land from making a defense to such mortgage in the absence of a showing that there was an agreement on the part of the grantee that the mortgage should be paid as a part of the purchase price, and holding further that such an exception in a deed in the covenant against incumbrances is mere notice to the grantee of the existence of such mortgage, and therefore not the basis for any action for breach of the covenant against incumbrances, and no more.

As to the effect of such clause as notice, the same rule has been held in *Reichert v. Neuser,* 93 Wis. 513, 517, 67 N. W. 939; *Perkins v. Best,* 94 Wis. 168, 175, 68 N. W. 762. The effect of such a clause, the payment of such mortgage being no part of the consideration between vendor and vendee, does not lessen the estate passing by the other terms of the deed. *Welbon v. Welbon,* 109 Mich. 356, 67 N. W. 338; L. R. A. 1917C, note p. 833. The fee passed by the deed, and not a mere equity of redemption.

The case of *Bennett v. Keehn, supra,* on the point here has been repeatedly cited with approval in other jurisdictions. *Sandwich Mfg. Co. v. Zellmer,* 48 Minn. 408, 51 N. W. 379, 381; *Smith v. Hogue,* 19 N. Dak. 337, 123 N. W. 827; *Stough v. Badger L. Co.* 70 Kan. 713, 79 Pac. 737.

It is further contended by plaintiff that the defendants *Mullen* taking possession of the house in the making of which were the materials for which the plaintiff's assignor had a claim for lien, and with full knowledge of such facts, the premises should be charged as against them with at least so much of the mortgage sought to be foreclosed as includes such claim for material.

The plaintiff's assignor, however, by his filing of his claim for lien and by limiting it to one acre instead of the larger amount to which he may have been entitled under the statute, evidently waived it as to any additional property than the one acre. By accepting a mortgage securing a

promissory note which extended the payment of this indebtedness for the amount claimed as a lien to a period beyond that which the statute prescribed for the commencement of an action to foreclose his lien, and by including other indebtedness than that for the amount of the mortgage, he thereby waived any subsequent right to assert his lien under the statute. *Flenniken v. Liscoe,* 64 Minn. 269, 66 N. W. 979; *Westinghouse A. B. Co. v. K. C. S. R. Co.* 137 Fed. 26, 71 C. C. A. 1, 2.

This holding is not affected by the section found in the mechanic's lien law (sec. 3317, Stats.) providing that "the taking of a promissory note or other evidence of indebtedness for any such work, labor or materials done or furnished shall not discharge the lien therefor hereby given unless expressly received as payment therefor and so specified therein." This statute has been repeatedly construed and always as referring to the taking of such a promissory note as falls due within the time within which the action to foreclose the lien could be commenced. *Bailey v. Hull,* 11 Wis. 289; *Schmidt v. Gilson,* 14 Wis. 514; *Thien v. Brand,* 142 Wis. 85, 86, 124 N. W. 999. See, also, 27 Cyc. 269.

By the Court.—Judgment reversed, with directions to dismiss the complaint as to the defendants *Mullen,* and with directions to enter judgment against those personally liable.

A motion for a rehearing was denied, with $25 costs, on January 13, 1920.

STATE EX REL. T. L. SMITH COMPANY, Respondent, vs. SUPERIOR COURT OF DANE COUNTY, Appellant.

October 10, 1919—January 13, 1920.

Superior court of Dane county: Supervisory control of circuit court: Appellate jurisdiction: Depriving circuit court of certain appellate jurisdiction as limiting supervisory control: Power of legislature: Mandamus to test refusal to change venue.

1. *Mandamus* is the proper remedy to test the validity of an order refusing a change of venue, in view of sec. 3069, Stats. (ch. 212, Laws 1895), rendering such orders nonappealable.
2. The superior court of Dane county, as created by ch. 136, Laws 1917, is an "inferior court" within the meaning of sec. 8, art. VII, Const., giving circuit courts "appellate jurisdiction from all inferior courts . . . and a supervisory control over the same."
3. Sec. 21, ch. 136, Laws 1917, providing that appeals from the superior court of Dane county, with certain exceptions, shall be to the supreme court, thereby depriving the circuit court for Dane county of such appellate jurisdiction, was within the legislative power notwithstanding sec. 8, art. VII, Const.
4. The legislature has no power to take away from the circuit courts their "supervisory control" over inferior courts given by sec. 8, art. VII, Const., the function of such control being to compel inferior tribunals to act within their jurisdiction, to prohibit them from acting outside their jurisdiction, and to reverse their extra-jurisdictional acts. Such supervisory control is separate and independent from appellate jurisdiction.
5. Sec. 21, ch. 136, Laws 1917, depriving the circuit court for Dane county of appellate jurisdiction from the superior court of Dane county in certain cases, did not and could not divest such circuit court of supervisory control over such superior court either directly or by implication.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

An action was begun by one Albrecht against the relator in the *Superior Court of Dane County* to recover the sum of $1,875, claimed to be due on contract. The relator moved for a change of venue to Milwaukee county on the

ground that its residence was there. The motion was denied by the *Superior Court,* and the relator procured from the circuit court for Dane county an alternative writ of *mandamus* requiring the *Superior Court* and A. C. HOPPMANN, the judge thereof, to show cause why the venue should not be changed as demanded by the relator. The *Superior Court* moved to quash the alternative writ, but the motion was denied and an order was entered accordingly, which also directed the *Superior Court* to make a return to the writ. From such order the *Superior Court* appealed.

J. J. McManamy of Madison, for the appellant.

John A. McCormick of Milwaukee, for the respondent.

VINJE, J. If the circuit court had supervisory control over the *Superior Court* as to the instant case, then *mandamus* was the proper remedy to test the validity of the order refusing a change of venue. *State ex rel. Spence v. Dick,* 103 Wis. 407, 79 N. W. 421. Such has been the practice since the passage of ch. 212, Laws 1895, rendering such orders nonappealable. *Evans v. Curtiss,* 98 Wis. 97, 73 N. W. 432; *Waukesha Co. Agr. Soc. v. Wis. Cent. R. Co.* 117 Wis. 539, 94 N. W. 289; *State ex rel. News Pub. Co. v. Park,* 166 Wis. 386, 165 N. W. 289.

That the *Superior Court of Dane County* as created by ch. 136, Laws 1917, is an "inferior court" within the meaning of sec. 8, art. VII, of the constitution, giving circuit courts "appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same," is established by the decision in *American L. & T. Co. v. Bond,* 91 Wis. 204, 64 N. W. 854, holding that the superior court of Douglas county, which has broader jurisdiction than that of the *Superior Court of Dane County,* is an inferior court.

But sec. 21 of the act creating the *Superior Court of Dane County* provides that

"All appeals in any action or proceeding tried or deter-

mined in the *Superior Court of Dane County* shall be taken to and reviewed by the supreme court in the same manner as appeals from orders and judgments of the circuit court, except that appeals in actions involving a breach of the charter or of any ordinance or by-laws of the city of Madison shall be taken to the circuit court for Dane county."

It will be seen that the instant case does not fall within the exception and therefore the circuit court for Dane county has no appellate jurisdiction thereof. The appeal lies directly to the supreme court. The power of the legislature to take away the appellate jurisdiction of the circuit court was sustained by an early decision of this court. See *Harrison v. Doyle,* 11 Wis. 283, and previous unreported decision therein referred to. This ruling has been steadfastly adhered to (*McNab v. Noonan,* 28 Wis. 434; *American L. & T. Co. v. Bond,* 91 Wis. 204, 64 N. W. 854), and has become a rule of property which this court must now respect no matter what its view thereof might be as an original proposition. The precise question therefore presented by this appeal is whether a circuit court retains supervisory control over an inferior court in cases wherein its appellate jurisdiction has been taken away by the legislature and vested in this court. An affirmative answer to the question is required by the decision in *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107, where it is said that the supervisory control of inferior courts cannot be taken away from the circuit courts.

The decision, though apparently made without a consideration of the cases of *Harrison v. Doyle,* 11 Wis. 283; *McNab v. Noonan,* 28 Wis. 434, and *American L. & T. Co. v. Bond,* 91 Wis. 204, 64 N. W. 854, would no doubt have been the same had these cases been considered by the court, for the ground upon which they were decided has never been clearly justified in view of the specific language of the constitution, but they have been adhered to under the doctrine of *stare decisis.* See *McNab v. Noonan, supra.*

But whether the construction given the appellate jurisdiction be correct or not, it does not govern the construction as to supervisory control. The latter is a separate, independent grant of jurisdiction, which, as construed in *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107, is irrevocably vested in the circuit court. Its function is (a) to compel inferior tribunals to act within their jurisdiction, (b) to prohibit them from acting outside their jurisdiction, and (c) to reverse their extra-jurisdictional acts. *State ex rel. Milwaukee Med. College v. Chittenden,* 127 Wis. 468, 512, 107 N. W. 500. This function is an important and substantial one and has frequently been referred to by our court as separate and independent from appellate jurisdiction. *Att'y Gen. v. Blossom,* 1 Wis. 317; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 517; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 613, 79 N. W. 1081; *Seiler v. State,* 112 Wis. 293, 87 N. W. 1072; *State ex rel. Milwaukee Med. College v. Chittenden,* 127 Wis. 468, 509, 107 N. W. 500; *Income Tax Cases,* 148 Wis. 456, 479, 134 N. W. 673, 135 N. W. 164. Since the superintending control vested in the supreme court is identical in its nature with the supervisory control given circuit courts over inferior tribunals, cases defining both have been referred to above.

It follows, therefore, that the act depriving the circuit court for Dane county of appellate jurisdiction from the *Superior Court of Dane County* in certain cases did not by implication divest it of supervisory control over the *Superior Court* as to such cases, or at all. The act is silent as to supervisory control and hence its loss of jurisdiction thereof, if any, would be by implication alone. But since this jurisdiction cannot be taken away directly, it cannot, of course, be taken away indirectly or by implication.

It follows that the circuit court for Dane county had jurisdiction of the *mandamus* proceeding and that its order must be affirmed.

By the Court.—Order affirmed.

SHEFFIELD-KING MILLING COMPANY, Respondent, vs. JACOBS, Appellant.

November 5, 1919—January 13, 1920.

Damages: Contract of sale: Breach by purchaser: Stipulated damages: Expressed intent of parties: Relation to actual damages: Difficulty of ascertaining damages: Relief from harsh or burdensome contracts: Validity determined as of date of execution: Gaming contracts: Market price of wheat as basis of damages: Pleading: Liberal construction on appeal: Evidence: Judicial notice of grades of wheat.

1. On appeal, an allegation of the answer in an action on contract that plaintiff suffered no damage will be liberally construed, as being equivalent to an allegation that the agreed measure of damages was unreasonable, and therefore as presenting the question whether the agreed damages are liquidated damages or a penalty, the case being presented on that theory and no other question being argued.
2. One asking relief from a contract freely entered into, in the absence of fraud or overreaching, does not bring himself within the field of judicial relief by merely showing that the result of the contract is harsh and burdensome.
3. Stipulated damages must appear to be grossly in excess of the actual damages, or have no relation thereto, before the court can say that the damages stipulated are a penalty.
4. The rule that in determining whether an amount agreed upon as damages was intended as liquidated damages or a penalty the expressed intention of the parties gives way to the equity of the particular case, applies only where damages are readily computable and where the agreed damages are largely in excess of the actual damages.
5. Courts are now strongly inclined to allow parties to make their own contracts and to carry out their intentions, even where it would result in the recovery of an amount stated as liquidated damages, upon proof of violation of the contract, and without proof of the damages actually sustained.
6. Judicial notice may be taken of the fact that No. 1 Northern wheat is one of the standard grades and that the prices of other grades have a direct, although perhaps a varying, relation to it.
7. In a seller's action for the breach of a contract for the sale of flour to be manufactured, a complaint which, while not alleging that plaintiff had purchased any particular lot of wheat for the manufacture of the flour, did allege that plaintiff was

ready, able, and willing to perform, must be taken to mean that plaintiff had on hand the raw materials out of which the flour was to be manufactured.

8. The validity of a contract is to be determined as of the date of its execution, and a contract valid when made cannot be rendered invalid even by legislative action.

9. In a contract for the sale of flour to be manufactured, made one month after the declaration of war by the United States against Germany, a provision for liquidated damages for the buyer's breach, while allowing recovery of large damages, apparently grossly disproportionate to the actual damages, is valid, in view of the uncertainty of the market and the difficulty of fixing the actual damages.

10. The fact that a provision for liquidated damages for the buyer's breach of contract for sale of flour to be manufactured was based on the market price of No. 1 Northern wheat at a named exchange, did not render the sale contract void as a gaming contract, in the absence of a showing that the parties did not intend to carry out the contract.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Contract. From the complaint it appears that the plaintiff is a Minnesota corporation located at the city of Minneapolis, and manufacturer and marketer of a certain grade and quality of flour known as "Gold Mine;" that on the 7th day of May, 1917, the defendant, a dealer residing at the city of Waupun, by written contract purchased 205 barrels of Gold Mine flour, 196 pounds to the barrel, which was packed in cotton bags each containing forty-nine pounds, and agreed to pay for the same at the rate of $12.10 per barrel. Said contract was duly executed by the parties, and the parts material here are as follows:

"Dated Waupun, Wisconsin, May 7, 1917.

"*Sheffield-King Milling Co.,* of Minneapolis, Minn., agrees to sell to *F. S. Jacobs,* of Waupun, Wisconsin, who agrees to purchase from seller at Faribault, Minn., at the price, on the terms and conditions, and subject to the agreements stated below and *on the back hereof,* the following goods:

"Number of barrels of flour, 205.

"Style of package, 49 lb. cotton.
"Brand, 'Gold Mine' flour.
"Price of flour per barrel, $12.10.
"Subject to confirmation of *Sheffield-King Mlg. Co.*
"Ship to Waupun, Wisconsin.
"Railroad delivery requested by buyer, C., M. & St. P.
"On directions to be furnished by buyer, shipment is to be made by seller after September 15th and before January 1, 1918.
"Terms: Net. Arrival draft with bill of lading attached.
"State Bank of Waupun, Wisconsin.
"Freight allowed to Waupun, Wisconsin."
(Paragraph relating to shipping directions, not material.)
"Par. 2. Buyer's failure or refusal to so furnish such directions on or before shipping date above, or within any extended period, if any, shall give seller right, as to any flour and also as to any feed, if any, remaining unshipped by reason of such failure or refusal, to either (a) treat contract as if rescinded without damages to either party; or (b) extend shipping date above, or extended period, if any, 30 days, and thereafter (as long as buyer fails or refuses to furnish such directions) continue the life of this contract by as many such successive extensions as seller may desire, all subject to hereinafter mentioned carrying charges against buyer; or (c) ship such goods to buyer within 30 days after shipping date above, or expiration of last extended period, exercising its judgment as to packages desired by buyer; or (d) treat contract as broken and (as to such unshipped goods only) terminate contract at 5 o'clock p. m. Central time, on shipping date above, or, if said date has been extended, then on last day of last extended period, and, as to such unshipped flour, recover from buyer (less any sum, if any, paid by way of carrying charges on such unshipped flour only) a sum to be calculated as follows: the difference between highest closing price, at Minneapolis, of No. 1 Northern (cash) wheat (delivered) on date this contract bears and highest closing price, at Mpls., of No. 1 Northern (cash) wheat (delivered) on date of such termination (if latter price be less than former) multiplied by the number of bushels of wheat required to manufacture such unshipped flour, figuring 4½ bu. to the bbl., plus a sum equal to 1c. multiplied by the number of bu. aforesaid (to be calculated for each 30 days, or fraction thereof, in-

tervening between date of this contract and date of such termination), plus, also, a sum equal to 4c. multiplied by the number of bu. aforesaid. And, if such price of such wheat on date of such termination is greater than price on date of this contract, seller's recovery shall be said 1c. per bu. for each 30 days, or fraction thereof, aforesaid, and said 4c. per bu. aforesaid, less such carrying charges paid, and less the difference between said two wheat prices, on the number of bu. aforesaid."

"Par. 9. If buyer prior to shipping date above (within) or expiration of any extended period, if any, repudiates any of his obligations hereunder, or requests or explicitly directs seller to cancel this contract, or otherwise expresses an intention not to carry out his part hereof, seller may, as to goods shipped and refused by buyer, recover damages as set out in par. 3 within; and, as to any and all goods unshipped under this contract, seller may exercise any one of the following rights: (e) treat entire contract as if immediately rescinded without damages to either party; or (f) treat such conduct as a breach of contract and immediately terminate this entire contract and recover from buyer, as to any and all goods unshipped under this contract, damages calculated in the same mode set out in sub. d of par. 2 within, with the qualification that, in such instance, dates for determination of prices shall be date this contract bears and date of termination of this entire contract under the provisions of this par. 9, and that said mode of calculation shall be applied, in such instance, to, and damages shall be calculated on, any and all goods unshipped under this contract, and not merely such goods as remain unshipped by reason of buyer's failure or refusal to furnish directions for the shipment thereof, and that carrying charges to be deducted shall be any and all carrying charges paid, if any, on any and all flour unshipped under this contract; or (g) seller may entirely disregard such conduct and breach on buyer's part and exercise any one of the rights given it in par. 2 within except that mentioned in sub. b thereof. In case seller elects under either sub e or f of this par., it shall immediately, on so electing, mail buyer notice of such election, and, failing to notify buyer, seller shall be deemed to have elected under sub. g of this paragraph. Seller may elect under either sub. e or f of this par. any time within 10 days after it has become aware of conduct of buyer in this par. referred to."

"Par. 10. In explanation of measure of damages set out in sub. d of par. 2 within; wheat prices therein shall refer to wheat actually in Mpls. at times therein indicated, such wheat being what is known at chamber of commerce, Mpls., as spot or cash wheat delivered, such closing prices being fixed daily (except Sundays and holidays) by said chamber of commerce. Such closing prices as shown by 'Daily Market Record' of Mpls. shall be conclusive unless proven materially erroneous. 'No. 1 Northern' shall refer to a certain grade of wheat commonly known by that name in said chamber of commerce and fixed from time to time in Minnesota. In case of seller's election under said sub. d the said 1c. per bu. and 4c. per bu. become fixed debits against buyer, carrying charges paid a fixed credit in his favor and difference in wheat prices is debited against him in case of a decline, and credited to him in case of a rise in price of wheat, such decline or rise being determined by multiplying the difference in prices of wheat on dates mentioned by the number of bushels mentioned. Under sub. f of par. 9 this mode of calculation is applied to all flour unshipped under this contract, even though there may be flour on which shipping directions are not due. Par. 2 within shall apply only to flour and also feed, if any (both or either), remaining unshipped by reason of buyer's failure or refusal to furnish shipping directions in accordance with par. 1, except that the mode of calculation set out in said sub. d shall apply, as above, under said sub. f. Sum allowed seller in said sub. d is on account of decline in price of wheat, if any, and such other damage, expense, and loss as may result by reason of buyer's default. Nothing herein shall require sum in said sub. d set out. In fixing damages as seller to prove any actual loss in order to recover in said sub. d, the desire is to agree upon a certain mode of calculation, since seller's actual loss cannot be predetermined, would be difficult of ascertainment and a matter, of argument, and said mode is an equitable general rule for measurement of seller's prospective actual loss. This contract is for purchase of goods to be manufactured."

That plaintiff was at all times between September 15, 1917, and the 2d day of November, 1917, when the plaintiff terminated the contract, ready, able, and willing to perform and carry out its part of this contract, and the plaintiff performed such contract except in so far as performance

has been prevented of execution by the conduct of the defendant; that on October 30, 1917, plaintiff received from defendant a letter as follows:

"*Sheffield-King Milling Co.,* 10—29—17.
"Minneapolis, Minn.

"Gentlemen: In reply to yours of Oct. 27th will say I will not remit you anything, but will cancel the contract for new wheat flour contract made May 7th, and effective after Sept. 15th to Jan. 1st, 1918.

"I am satisfied to let the court decide what you are entitled to by my canceling this contract.

"Yours truly, F. S. JACOBS."

That by said letter the defendant intended to and did repudiate and cancel the contract of sale between the parties, within the meaning set out in said contract; that on November 2, 1917, pursuant to the terms of said contract, the plaintiff elected to and did treat the conduct of the defendant as a breach by the defendant of his contract, and did then on said day immediately terminate the contract in accordance with its provisions. In response thereto the plaintiff, on the 2d day of November, mailed the defendant the following letter:

"*Mr. F. S. Jacobs,* November 2, 1917.
"Waupun, Wis.

"Dear Sir: Referring now to your contract with us dated Waupun, Wis., May 7, 1917, wherein we agreed to sell to you and you agreed to purchase from us, 205 bbls. of our "Gold-Mine" flour, to be packed in 49-lb. cotton sacks at the price of $12.10 per bbl., freight allowed to Waupun, Wis.

"Beg to state that we have received your letter of the 29th ult., and have carefully noted its contents.

"We regard your letter of the 29th ult. as a repudiation by you of your obligation under said contract.

"We think it is equivalent to a statement to the effect that you will not perform your part thereof.

"Since you have stated that you will not perform your part of the contract, we can see no reason why we should continue to remain in readiness to perform any longer, nor

can we see any reason why we should not take you seriously in your statement.

"We refer you to subdivision 'F2' of paragraph 9 on the back of your contract, and we hereby give you notice that we have this day elected under subdivision 'f' of paragraph 9 of your said contract, to treat your conduct, as evidenced by your said letter of the 29th ult., as a breach of your said contract, and we have this day terminated said contract and hereby demand that you pay us damages as set out in subdivision 'f' of paragraph 9 of said contract.

"We are giving you this notice pursuant to the terms of paragraph 9 of said contract, and sending you this letter by registered mail, requesting return receipt, so that you may govern yourself accordingly.

"The damages which we are entitled to recover from you on termination of your said contract are calculated as follows, pursuant to subdivision 'f' of paragraph 9 thereof:

Highest closing price per bu. of No. 1 Northern cash wheat (delivered) at Minneapolis, Minn., on May 7, 1917 (date of contract)	$3 08
Highest closing price per bu. of No. 1 Northern cash wheat (delivered) at Minneapolis, Minn., on Nov. 2, 1917 (date of termination)	2 21
Decline in price of wheat per bu.	87
Number of barrels of flour unshipped under the contract: 205 @ 4½ bu. wheat per bbl., 922½ bu.	
First item of authorized recovery under the contract is the sum of 87c. per bu. decline in price of wheat multiplied by 922½ bu. or	802 58
Number of periods of 30 days each or fraction thereof intervening between May 7, 1917 (date of contract) and Nov. 2, 1917 (date of termination): 6 periods.	
Second item of authorized recovery is: 1c. x 922½ x 6	55 35
Third item of authorized recovery is: 4c x 922½	36 90
Total authorized recovery	$894 83

"Yours very truly,

"SHEFFIELD-KING MILLING CO.

President.

"HHK—O

"C. C. Boorman."

"13. That on November 2, 1917, and at the time plaintiff took the action described in foregoing paragraph 10, no

portion of the flour described in the contract, Exhibit 'A,' had been shipped to defendant, but that all thereof then remained unshipped by reason of the fact that defendant had failed and refused to permit plaintiff to ship any portion thereof, and had, up to said time, failed, neglected, and refused to furnish plaintiff with shipping directions therefor in accordance with paragraph 1 of Exhibit 'A' or otherwise, and that at no time has any of said flour been shipped or delivered to defendant by reason of the facts aforesaid, and that plaintiff has been prevented and excused from shipping and delivering said flour, or any part thereof, by the aforesaid conduct of defendant."

That the damages sustained by the plaintiff as computed according to subdivision f of paragraph 9 and subdivision d of paragraph 2 of said contract amount to $894.83; that the highest closing price of No. 1 Northern (cash) wheat (delivered) at Minneapolis, Minnesota, on May 7, 1917, was $3.08 per bushel, and that the highest closing price of No. 1 Northern (cash) wheat (delivered) at Minneapolis, Minnesota, November 2, 1917, was $2.21 per bushel; and demanded judgment.

Defendant answered, admitting the corporate character and business of the plaintiff, and alleged that:

"He [defendant] admits the parties hereto entered into the contract as alleged in said complaint, and that the plaintiff accepted and confirmed the same and that the plaintiff has at all times been ready and willing to perform its part hereof.

"He admits that he sent to plaintiff the letter, a copy of which is set out in said complaint, marked Exhibit 'C,' and that in reply thereto the plaintiff sent to said defendant the letter referred to in said complaint, a copy of which is marked Exhibit 'D,' and that he duly received and retained the same.

"He admits no portion of the flour described in said contract has ever been shipped to said defendant and that he failed to give said plaintiff any shipping directions therefor.

"He admits the prices of wheat were as alleged in said complaint, and that said defendant has made no payment to said plaintiff on account of said contract.

"He denies each and every other fact alleged in said complaint, and especially denies that the said plaintiff suffered any damage whatever, through, under, or by reason of said contract.

"He alleges that said plaintiff suffered no damage whatever by reason of or under said contract and that the situation of said plaintiff arising from said contract is '*damnum absque injuria.*' "

The plaintiff moved for judgment upon the pleadings, the motion was granted, the judgment was rendered for $894.83 and costs, from which judgment the defendant appeals.

C. E. Hooker of Waupun, for the appellant.

For the respondent there was a brief by *Clark & Lueck* of Beaver Dam, attorneys, and *H. L. Hoidale* of Minneapolis, of counsel, and oral argument by *A. W. Lueck.*

ROSENBERRY, J. Some doubt exists as to whether or not the answer raises any issue. Giving to the allegations of the answer every reasonable intendment and the most liberal construction, we are constrained to hold that the allegation that there was no damage suffered by the plaintiff is equivalent to an allegation that the agreed measure of damages is unreasonable, and bears no relation to the actual damages suffered by the plaintiff, and the question of whether or not the agreed damages are in the nature of liquidated damages or a penalty is presented. This is a most liberal construction, and one which we adopt the more readily for the reason that without objection the case has been argued and presented upon both sides upon that theory. While the plaintiff in its brief stated that it contends that the simple allegation in the answer that respondent has in fact suffered no damage is not sufficient to put in issue the question of whether or not the contract is valid as providing for liquidated damages, or invalid as providing for a penalty, it assumes for the purpose of argument that that is the question before the court, and no other question is argued.

The defendant contends that the sum of $894.83 cannot be considered otherwise than as a penalty and cites *Hath-*

away v. Lynn, 75 Wis. 186, 43 N. W. 956; *J. G. Wagner Co. v. Cawker,* 112 Wis. 532, 88 N. W. 599; *Berrinkott v. Traphagen,* 39 Wis. 219; *Davis v. La Crosse H. Asso.* 121 Wis. 579, 99 N. W. 351; *Madison v. American S. E. Co.* 118 Wis. 480, 95 N. W. 1097; *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490.

The courts of this and other states have gone a long way in protecting parties from their own contracts, and this upon the theory that a harsh and unreasonable contract will not be enforced when a party may be relieved therefrom within the established rules of law; but a party asking relief from a contract freely entered into, in the absence of fraud or overreaching, must bring himself within the field of judicial relief; and the fact that, as in this case, the result is harsh and burdensome, is not by itself sufficient to do that.

Courts will ascertain for themselves the real intent of the parties to the contract, and are not bound by the assertions of the parties themselves as to that intent, and the stipulated damages must appear to be grossly in excess of the actual damages, or have no relation thereto, before the court can say within established principles that the damages stipulated are a penalty. We take it that these fundamental principles are well established, and certainly are recognized in the Wisconsin cases above cited. See, also, 1 Sutherland, Damages (4th ed.) § 283 and cases cited.

The intent of the parties in this case is made clear by the recitals of the contract itself, and particularly so when they are considered in relation to the complicated and complex situation with which the contract deals. The contract is not one for the sale and delivery of an article to be procured in the open market and delivered to the purchaser. It is a contract for the manufacture of a commodity from a basic raw material. Actual damages could not therefore be established by showing the difference between the contract price of Gold Mine flour and the market price, assuming

that it had an established market price. The inquiry would therefore involve purchase and storage of wheat, cost of manufacture into flour, and many other subsidiary questions.

While, as this court has said, "in determining whether an amount agreed upon as damages was intended as liquidated damages or as a penalty, rules of language are ignored, and the expressed intent of parties is made to give way to the equity of the particular case, having due regard to precedents," nevertheless, such a rule is applied only where damages may be readily computed and the "stipulated damages, so called, are largely in excess of the actual damages." *Seeman v. Biemann,* 108 Wis. 365, 374, 84 N. W. 490; 1 Sutherland, Damages (4th ed.) § 283. In a case such as this, which is clearly one where the damages are difficult, if not almost impossible, to ascertain, to require a party to establish the actual damages as a condition precedent to his right to recover stipulated damages is in practical effect to refuse legal effect to his contract. The courts are now strongly "inclined to allow parties to make their own contracts and to carry out their intentions even where it would result in the recovery of an amount stated as liquidated damages, upon proof of violation of the contract, and without proof of the damages actually sustained." *U. S. v. Bethlehem S. Co.* 205 U. S. 105, 27 Sup. Ct. 450.

It is argued that in the absence of an allegation in the complaint that the plaintiff had purchased No. 1 Northern wheat, and in the absence of an allegation that the article to be delivered was to be manufactured from No. 1 Northern wheat, the contract is speculative and ought not to be enforced. Reference to the daily market reports, as well as to the proclamations of the President of the United States, issued February 21, 1918, and September 2, 1918, shows that No. 1 Northern wheat is one of the standard grades of wheat, to which in the primary markets of the country the prices of other grades of wheat bear a direct relation, and

the court may take judicial notice of the fact that the grade of wheat specified in the contract is one of the standard grades, and that the prices of other grades have a direct, although perhaps a varying, relation to it. The contract does not specify out of what particular grade of wheat the flour was to be manufactured. It is supposable at least that it might be made out of different grades purchased at different times, and depend to some extent upon the process of manufacture. It is certain that the flour was to be made of wheat, and that the price of all wheat bears a definite relation to the price of No. 1 Northern.

It is because of the fact that a manufacturer may not be able to trace into the manufactured product agreed to be delivered, specific purchases of material, that proof of actual damages becomes difficult and the stipulation of parties as to damages is permitted to stand in cases of this kind. The difficulties of the situation are well illustrated in the case of *Erie B. Co. v. Hubbard M. Co.* 217 Fed. 759; *Russell Miller M. Co. v. Bastasch,* 70 Oreg. 475, 142 Pac. 355; *River S. Co. v. Atlantic Mills,* 155 Fed. 466.

While the complaint does not allege that the parties have purchased any particular lot of wheat for the manufacture of the flour agreed to be delivered to the defendant, it does allege that the plaintiff was ready, able, and willing to perform and carry out its part of the contract, and that it had performed the same except in so far as performance thereof had been prevented by the conduct of the defendant. This must be taken to mean, as it certainly does mean, that the plaintiff had on hand the raw materials out of which the flour was to be manufactured and delivered.

It will not do for the defendant to enter into a contract such as the one set out in the complaint, wait until time of delivery, and, when performance is tendered, refuse to accept it, and in the light of subsequent developments violate the terms of his contract and then take that position which is most advantageous to himself. The validity of

a contract is to be determined as of the date of its execution, and a contract valid when made cannot be rendered invalid even by legislative action. *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, 122 N. W. 1023. It is the situation of the parties at the time of the inception of the contract that governs. *Davis v. La Crosse H. Asso.* 121 Wis. 579, 99 N. W. 351.

While the damages recoverable under the contract in this case are large and appear grossly disproportionate to the actual damages which the plaintiff may have suffered, we cannot, especially upon the facts set out in the record in this case, say that they are so as a matter of law. The contract was entered into on May 7, 1917, about one month after this country had declared war against the Central empires. No one knew or could foresee what the condition of the grain market would be a month, much less six months, in the future. The general situation must have been in the contemplation of the parties at the time this contract was entered into. It was well known that wheat is a basic, essential commodity. The food and fuel control act was passed by Congress August 10, 1917, and on August 30, 1917, a little more than two weeks before the defendant had a right to require delivery under the contract, the President, by proclamation, fixed the price of the 1917 crop on the basis of $2.20 a bushel for No. 1 Northern spring wheat at Chicago. No doubt this action of the government had a great influence, if it was not in fact directly controlling, as to the price of wheat. See War Industries Board Bulletin No. 9. As was said in *Sheffield-King M. Co. v. Domestic Science B. Co.* 95 Ohio St. 180, 115 N. E. 1014, having under consideration a contract similar to the contract involved here,

"The parties agreed that wheat, the thing from which the flour was to be made, should be the basis upon which to calculate damages. They could, of course, have agreed that the flour should be such basis, but they did not do so.

That was a matter for them to agree about. They did not fix an arbitrary lump sum which might turn out to be wholly inequitable, but fixed a method, the chief element of which was the price of wheat from which the flour was to be made, a matter not within the control of either."

While in that case it was said that "when the plaintiff proved it had performed the terms of the contract on its part, had purchased the necessary wheat, and showed the damages that had accrued on the basis agreed on, it was entitled to recover," we think the allegation in the complaint in this case, that the plaintiff was prepared, able, ready, and willing to perform the contract, is an allegation that it had on hand the materials out of which the flour to be delivered to the defendant in this case was to be manufactured; at least no issue in that respect is tendered by the pleadings in this case.

The inherent difficulties of proving the actual damages in a case such as this are such as in practical effect to preclude a manufacturer from recovering damages because of the consequent expense and the disorganization of his business. The removal of auditors, accountants, managers, and foremen from the business of a large highly organized concern during the time necessarily consumed in a trial entails an expense, in excess of recoverable costs, so great as to prevent in many cases any reimbursement to a manufacturer. Any one who has attempted to establish the amount of actual damages in a case will fully realize this. *Garton Toy Co. v. Buswell L. & M. Co.* 150 Wis. 341, 136 N. W. 147, illustrates the difficulty in a comparatively simple case.

As was said by Judge CHRISTIANCY, this is a case "where, from the nature of the contract and the subject matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties

themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them." *Jaquith v. Hudson,* 5 Mich. 123.

Modern business is so managed as to avoid litigation; the tendency is away from litigation—a tendency which should be encouraged in all fair and legitimate ways because it is conducive to the general welfare. Time and effort consumed in litigating questions of damages generally result in substantial financial loss to both sides. Stipulations of parties, therefore, which establish a plain, simple rule of damages, having a just and fair relation to the subject matter of the contract, in cases where the ascertainment of actual damages is difficult, ought, in the public interest, to be given legal effect. *U. S. v. Bethlehem S. Co.* 205 U. S. 105, 27 Sup. Ct. 450.

Where such contracts are entered into, which are fairly within established legal principles, it is not the business of the courts to interfere and attempt to set aside such stipulations, as has often been done with the result that while theoretical legal justice may be attained, as a practical matter justice is denied. There is no reason why courts should regard with paternalistic solicitude the situation of a party who has deliberately broken his contract. Contracts are not made to be broken but to be lived up to, and the loss, if any, in the event of breach, ought to fall on the wrongdoer rather than upon the innocent party. A litigant who is compelled to expend two hundred dollars to recover one hundred dollars damage, no question of fundamental principles being involved, does not feel that he has received justice, but rather that an injustice has been done him.

Parties to contracts are, as a rule, very much more familiar with the subject matter with which the contract deals, the conditions under which the contract is to be performed,

than courts and juries can possibly be, and where they attempt in a fair way to agree upon a method of computing damages in case of breach by either party they are much more likely to arrive at a just result than is court or jury upon a trial. See *Sun P. & P. Asso. v. Moore,* 183 U. S. 642, 22 Sup. Ct. 240; *U. S. v. Bethlehem S. Co.* 205 U. S. 105, 27 Sup. Ct. 450; 1 Sutherland, Damages (4th ed.) § 283, p. 842; *Knox Rock B. Co. v. Grafton S. Co.* 64 Ohio St. 361, 60 N. E. 563.

It is suggested that, because the market price of No. 1 Northern wheat at Minneapolis is made the basis for computing the plaintiff's damages, the contract is therefore void as a gaming contract. *Atwater v. Manville,* 106 Wis. 64, 81 N. W. 985; *Lowry v. Dillman,* 59 Wis. 197, 18 N. W. 4; *Barnard v. Backhaus,* 52 Wis. 593, 6 N. W. 252, 9 N. W. 595. There is, however, not the slightest intimation in the record that the parties at the time of making this contract did not intend to carry it out in accordance with its terms. In fact, every inference to be drawn from the conduct of the parties, both at the time of the inception of the contract and down to the time of its breach, indicates clearly and definitely that it was the intention of the parties to perform it. It is therefore a valid contract. *Wall v. Schneider,* 59 Wis. 352, 18 N. W. 443. The fact that the great market places of the world are made use of by gamblers in the conduct of an illegitimate and unlawful business does not alter the fact that organized markets are not only proper but necessary under modern conditions. They perform a valuable and serviceable function in the process of distribution, and there is no reason why prices established there may not be made the basis for adjusting contract rights.

It is apparent that at the inception of the contract the probable damages which the plaintiff might suffer in the event of a breach by the defendant would be difficult of ascertainment and uncertain. The parties agreed upon a fair basis of computation, and, while the amount recovered

is large, great variations in the market price of wheat and flour must have been anticipated by the parties, and in view of all the circumstances the amount recovered is not unconscionable. The contract was in no way a gaming contract, and was therefore valid, and the judgment of the circuit court was right.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). By the affirmance of the judgment of the court below judicial sanction and thereby judicial approval is given to the allowance as stipulated damages of an amount of not less than $4 per barrel for breach of a contract to buy such a staple necessary essential as flour, sold at the agreed price of $12.10 per barrel.

This item of so-called damages necessarily includes the profits of the transaction, and under the facts here can be reasonably construed to include nothing but profits.

If this is a legitimate, reasonable, and lawful profit between miller and wholesaler, it would have to be held to be such in a similar contract for the further sale of this same flour from the wholesaler to the retailer, and then again between the retailer and consumer. It presents a vista of hope for him who wishes to profit in the necessaries of life, but a rather hopeless horizon for the producer and the consumer.

This contract was made May 7, 1917, for delivery between September 15th and January 1st following. The United States Food Administration, by a regulation published August 24, 1917, declared that the maximum average profit of twenty-five cents per barrel of flour was reasonable and any profits in excess "unjust and unreasonable." This twenty-five cents per barrel profit, although of course not controlling as to this contract of an earlier date, is cited here in contrast with the $4 per barrel allowed by this judgment.

In the same bulletin appears the following:

"In order to prevent hoarding and speculation in contracts for futures, no miller shall make, or have outstand-

ing at any time, any contract for the sale of flour or feed, except such contracts as require shipment of such produce within thirty days after the making of such contracts."

This quotation speaks for itself as to the view taken by the federal food administration on the possibility of just such contracts as are here involved being aids or instruments for hoarding and for speculation in contracts for futures, which is but another expression for gambling.

In the absence of evidence showing such a state of facts or circumstances surrounding this particular contract as would overthrow the *prima facie* showing of grossness, exorbitance, and swollen profits, I think the court should declare that such a stipulation resulting in such damages, whether it was therein definitely fixed at $4 per barrel or the same result reached by the agreed application of the multiplication table, is *prima facie* for a penalty and not for legal recoverable damages; leaving open to the plaintiff, however, the right of showing the court upon evidence that the facts and circumstances in this case warrant the allowance of these amounts as within the field of reasonable damages.

From these elements of exorbitance and the apparent absence of any reasonable connection between the method of computation and the actual performance of the contract, it meets all the requirements so repeatedly recognized under the general rule, and particularly by this court, as distinguishing a penalty from liquidated damages. *Seeman v. Biemann,* 108 Wis. 365, 374, 84 N. W. 490; *Davis v. La Crosse H. Asso.* 121 Wis. 579, 589, 99 N. W. 351; *J. G. Wagner Co. v. Cawker,* 112 Wis. 532, 541, 88 N. W. 599; *Grant M. Co. v. Marshall & Ilsley Bank,* 166 Wis. 547. 555, 165 N. W. 14. See, also, *Joeckel v. Johnson,* 178 Iowa, 231, 159 N. W. 673, 676.

Both of the elements of extraordinary disproportion between the agreed damages and the damages which might result, or of exorbitance, are always recognized as throw-

ing such a stipulation into the class of penalties rather than of stipulated damages in those cases even where the indefinite and uncertain element of time delay is the basis. It is so expressly stated in the case cited in the majority opinion of *U. S. v. Bethlehem S. Co.* 205 U. S. 105, 121, 27 Sup. Ct. 450, and repeated in *Maryland D. & C. Co. v. U. S.* 241 U. S. 184, 190, 36 Sup. Ct. 545; *Wise v. U. S.* 249 U. S. 361, 365, 39 Sup. Ct. 303; *In re Liberty Doll Co.* 242 Fed. 695, 701.

And such penalties are not enforced not from any desire to—quoting now from the majority opinion herein—"regard with paternalistic solicitude the situation of a party who has deliberately broken his contract," but because a court refuses to be the third and enforcing party to an unconscionable agreement which for that reason is against public policy. *Richmond v. Conservative L. Ins. Co.* 166 Wis. 334, 341, 165 N. W. 286. Neither is he who speculates in food entitled to sympathy or solicitude.

It has long stood as a definitely declared principle recognized by this court that in executory contracts of sale the right to break such a contract, subject of course to respond in damages, is on substantially the same footing as the right to make just such a contract. *Haueter v. Marty,* 156 Wis. 208, 212, 145 N. W. 775; *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 494, 103 N. W. 236, 104 N. W. 920; *Badger State L. Co. v. G. W. Jones L. Co.* 140 Wis. 73, 79, 80, 121 N. W. 933. And again in *Malueg v. Hatten L. Co.* 140 Wis. 381, 384, 122 N. W. 1057, where this court adds that such breach of contract, without proof of legal damages, gives to the other party no right of recovery. Page 386.

There being no element of tort involved here, the general rule of liability for breach of contract is as was stated in *McLennan v. Church,* 163 Wis. 411, 422, 158 N. W. 73, "the limit of recovery is such damages as may be reasonably considered to have been in contemplation by the parties at the time of making the contract as the probable result of a

breach of it." See, also, *Malueg v. Hatten L. Co., supra,* at p. 385.

Conceding for the purposes of this case that although parties to such a contract have the legal right to breach it as to the conditions therein contained as to performance, but must nevertheless be held as to the conditions therein expressed as to the damages, yet such damages must nevertheless be such as were within the field of legal, reasonable anticipation of the parties at the time of making. If the final result savors of a penalty rather than legal damages, then such result was not within the reasonable anticipation of the parties and ought not to be enforced by the court.

Merely because the plaintiff asserts in its contract and defendant acquiesces that the milling business is so complicated and mysterious that its profits cannot be ascertained, ought not to deter a court from examining into its business, any more than a similar suggestion to the tax assessor should bind him to accept what is offered rather than to insist on what is due. Joint declarations of the parties that the unconscionable is conscionable, or that their ways of doing business are beyond ken, should neither blind nor bind the court.

Furthermore, the provision of the contract now offered, fixing the measure of damages by the fluctuation in the price of No. 1 Northern wheat on the Minneapolis market, is, from what appears in this record, a gamble and therefore void. When the principal contract is so tainted or a subsidiary contract is, with knowledge of the party seeking to recover thereon, based upon such a tainted transaction, there can be no recovery. *Kassuba C. Co. v. Blodgett,* 155 Wis. 529, 531, 143 N. W. 1060, 145 N. W. 177; *Carson v. Milwaukee P. Co.* 133 Wis. 85, 91, 93, 113 N. W. 393; *Olson v. Sawyer-Goodman Co.* 110 Wis. 149, 85 N. W. 640; *Atwater v. Manville,* 106 Wis. 64, 81 N. W. 985.

There is here evidently no attempt at a compliance with

sec. 2319*a*, Stats., relating to board of trade contracts. That there was no intention to either purchase for defendant, or to use in the manufacture of the flour which was the subject of the contract, No. 1 Northern wheat whose falling price determined the measure of plaintiff's damages and profits (plaintiff having carefully reserved the right under par. 2a, applicable as here but in the case of a rising market, to "treat the contract as if rescinded without damages to either party"), is evident from the following:

First, there is no provision in the contract for such purchase or use and no allegations of such in the complaint; there was therefore nothing in that regard for the defendant to deny.

Second, at no time could either defendant or plaintiff successfully have maintained under this contract that plaintiff was holding or obliged to hold for defendant any quantity of wheat of any grade.

Third, the idea of a wheat contract is expressly negatived by the language of the contract itself, in paragraph 10, "this contract is for the purchase of goods to be manufactured," and in paragraph 5, "goods shall not be deemed manufactured until shipped;" plaintiff thereby expressly excluding the idea of any obligation on its part to manufacture flour for this contract prior to an order for shipment, and therefore is really binding itself to ship from a stock of flour only and not from a stock of wheat, and that is all that its allegations of readiness and compliance with the contract on its part should reasonably be extended to cover.

Under the method of computation provided for of four and one-half bushels of wheat to the barrel of flour, there is a resulting surplus of seventy-four pounds in weight, certainly of some value to plaintiff but not accounted for to defendant in assessing the damages, and yet upon which he is charged. If this contract contemplated the purchase for

him of wheat, it is manifest that plaintiff has withheld items of value from defendant's wheat for which it should account.

If, as a matter of fact, plaintiff bought no wheat for this particular sale of flour or bought none until it was ready to deliver upon order of defendant pursuant to the contract, it could then have bought, to make good its depletion in its stock of flour, wheat at the then market price, and there would have been no actual damage, and it would have paid no actual carrying charges, although it has been allowed that also as damages in this case in addition to the $4 per barrel.

If it did manufacture this order of flour it was its duty to minimize damages arising from the breach of defendant in refusing to buy by disposing of this flour at the best market price then obtainable. *Centennial E. Co. v. Morse,* 227 Mass. 486, 490, 116 N. E. 336. If such price was not below the contract price there was no recoverable damage; if lower, the difference measured the legal damage and is the proper measure thereof. *Stock v. Snell,* 213 Mass. 449, 100 N. E. 830; *Hall v. Paine,* 224 Mass. 62, 65, 112 N. E. 153.

This case was disposed of in the court below on the case quoted in the majority opinion of *Sheffield-King M. Co.* (this plaintiff) *v. Domestic S. B. Co.* 95 Ohio St. 180, 115 N. E. 1014. There must be noted, however: The contract there was made in 1912 and the price was $4.75 per barrel as against the $12.10 here; there is nothing to show what proportion the amount recovered as damages bore to the contract price there, or that the question of grossness of profits was before the court. And there, by implication at least, the court recognized the necessity of plaintiff's doing in that case what, it appeals to me, the plaintiff should be required to do here, namely, show that it purchased the wheat for that contract, if it desires to recover damages for any depreciation in wheat price, when that opinion says: "In this situation, when the plaintiff proved it had per-

formed the terms of the contract on its part, *had purchased the necessary wheat,* and showed the damages that had accrued on the basis agreed on, it was entitled to recover." *Erie B. Co. v. Hubbard M. Co.* 217 Fed. 759, also cited in the majority opinion and in the Ohio case, based the right to recover such a difference in wheat price upon an express showing made therein by plaintiff of an actual purchase of wheat made at the time of the making of the contract to meet the requirements. That essential fact is missing in this case.

If the answer herein was not sufficient to properly present the issues that should be tried between these parties, then, under sec. 2405*m,* Stats., it is the duty of this court to direct that they shall be tried.

I think the judgment should be reversed and the plaintiff put to its proof to show that what on its face appears to be illegitimate was legitimate, and what stares out from this measure of damages as an element of extortion and speculation was nevertheless an actual, substantial, and legal element of damage.

GEORGE and others, Respondents, vs. BODE and others, Appellants.

November 5, 1919—January 13, 1920.

Adverse examination: Nonresident party not served with notice and subpœna: Place of examination.

1. Under sec. 4096, Stats., as existing March 31, 1919, the trial court had no power to order an adverse examination of a nonresident party to take place within the state when he could not be personally served with notice and subpœna.
2. The amendment of sec. 4096, Stats. 1917, by ch. 239, Laws 1919, relative to the power of the court to fix the time and place of examination, contemplates that it should be left in the discretion of the trial court to say whether a nonresident be examined in this state or at his domicile.

OWEN, J., dissents.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The plaintiffs and respondents are residents of Mississippi, the defendants and appellants of Wisconsin. After the service of the complaint the appellants filed an affidavit for the purpose of procuring an adverse examination of the respondents under sec. 4096, Stats., in order to enable them to plead to the complaint, and moved that the circuit judge fix a time and place within this state for such examination and require the plaintiffs to attend at such time and place and submit to such examination. The circuit judge held that, while the defendants were entitled to examine the plaintiffs under sec. 4096, the court had no power under the statute to compel them to appear in Wisconsin and submit to such examination, and for that reason alone denied the motion. The defendants appealed.

The cause was submitted for the appellants on the brief of *Adolph Kanneberg* of Milwaukee, attorney for *Alfred von Cotzhausen* and *Progress Blue Ribbon Farms,* and *D. S. Tullar* of Waukesha, attorney for *Friedericke Bode,* and for the respondents on that of *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.,* of counsel, all of Milwaukee.

WINSLOW, C. J. Conceding for the purposes of the case that a nonresident may legally be required by statute to appear within this state and submit to an examination under sec. 4096, Stats., as a condition of maintaining his action, the question presented is whether, at the time the order in question was made, namely, March 31, 1919, the statute so provided.

At that time sec. 4096 contained two provisions bearing on the subject. Sub. 3 of that section provided that

"The attendance of the party to be examined . . . may be compelled upon subpœna and the payment or tender of his fees as a witness. *If the party . . . is a nonresident of this*

state, the court may upon motion fix the time and place of such examination. He shall attend at such time and place and submit to the examination."

Sub. 6 provides that

"Such examinations shall not be compelled in any other county than that in which the party to be examined resides, *except as hereinbefore provided;* provided, however, that whenever plaintiff or defendant is a nonresident of this state his deposition may be had under the provisions of this section in any county in the state, if he can be personally served with notice and subpœna."

The italicised clauses were added to the section by ch. 84, Laws 1909, and the argument is that they show that the legislature intended thereby to empower the court to fix the time and place of a nonresident's examination within the state. Otherwise, it is said, the clause in sub. 6, "except as hereinbefore provided," has nothing to refer to. The argument is not without its weight, but on the other hand the special provision still appears, to the effect that the deposition of a nonresident may be taken in any county of the state *if* he can be personally served with notice and subpœna.

This seems to us very persuasive. It is almost, if not quite, the *expressio unius* which excludes anything else. The examination may be taken in this state *if* he can be personally served with notice and subpœna; the inevitable inference is that it is only if he can be so served that he can be so examined. If the provisions of sub. 3 meant that the court might fix a time and place for his examination within this state regardless of the personal service of notice and subpœna, then the provisions of sub. 6 regarding nonresidents would be wholly unnecessary.

These considerations move us to construe the statute as not empowering the court to order the examination of a nonresident to take place within this state when he cannot be personally served with notice and subpœna.

Attention is called to the fact that the legislature of 1919, by ch. 239, amended sub. 3 above quoted by adding the words "either within or without the state" to the clause authorizing the court to fix the time and place of examination. This makes it clear that the legislative idea now is to leave it in the discretion of the trial judge to say whether a nonresident be examined in this state or at his domicile.

There may be important and serious questions raised and argued when an order is made under this statute compelling a party in a distant state to appear in Wisconsin for examination under sec. 4096. We shall not anticipate those questions now.

By the Court.—Order affirmed.

OWEN, J. (*dissenting*). I cannot concur in the construction which the court places upon the amendment of sec. 4096, embodied in ch. 84, Laws 1909. That amendment was prepared and introduced in the legislature by the Senate judiciary committee of which I was a member. I know that the members of that committee supposed that the amendment clearly conferred power upon the circuit court to require the attendance of a nonresident party within the state for the purpose of submitting to an examination under sec. 4096. Upon a careful analysis of the amendment, I am still of the opinion that such is its reasonable interpretation. The legislature of 1919 further amended the section by adding the words "either within or without the state" to the clause authorizing the court to fix the time and place of examination. I regard this as a conscientious and painstaking effort on the part of the legislature to place its intent beyond the possibility of misunderstanding, rather than a declaration that the law as it then stood did not confer the right upon the circuit court to require a nonresident defendant to attend at a place within the state. I therefore dissent.

STATE EX REL. MOON and others, Respondents, vs. NYGAARD, County Clerk, Appellant.

December 2, 1919—January 13, 1920.

Income taxation: Dividends of corporation from surplus: Holding company: Right of stockholder to show dividend not from earnings or profits.

1. Under sub. 2 (b), sec. 1087*m*—2, Stats., as amended by ch. 247, Laws 1917, a stockholder in any corporation to whom there has been paid a sum of money under the designation of dividends has a right to show that such payment or dividend was made out of the capital or surplus and is therefore not taxable, instead of out of the earnings or profits accrued since January 1, 1911, which would be taxable.
2. Where a stockholder of a corporation exchanged his stock for stock in a holding company, and the holding company received from the corporation a so-called dividend, paid out of the surplus and not out of the earnings or profits accrued after January 1, 1911, a dividend paid by the holding company, resulting from such dividend from the surplus of the corporation, was not "income," within the meaning of sub. 2 (b), sec. 1087*m*—2, as amended by ch. 247, Laws 1917.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

The plaintiffs in this action were stockholders of the Sallie F. Moon Company, a Wisconsin corporation. That company was organized in 1906, and its capital stock of $400,000 was issued to the mother of relators in consideration of the transfer to it of her property, and among such were 1,893 out of the 2,423 shares of the capital stock of the Northwestern Lumber Company, also a Wisconsin corporation. Although the charter of the Sallie F. Moon Company authorized the dealing in real and personal property, loaning money, general merchandising, manufacturing, lumber and logging business, it appears that it functioned merely as a holding company in collecting returns from and conserving its assets and distributing them among its stockholders.

January 1, 1911, the Northwestern Lumber Company had a surplus of $5,268,851.19. This was reduced from year to year thereafter by dividends declared from that as well as from its earnings, so that on January 1, 1915, the surplus was $4,548,688.93, and on January 1, 1916, $4,292,198.28.

The Northwestern Lumber Company made no profit in carrying on its business during the years 1915 and 1916 respectively, as appeared from its returns to the tax commission.

On the 1st of December, 1916 and 1917, resolutions were respectively adopted declaring a dividend of fifty per cent. on the outstanding capital stock of the Northwestern Lumber Company, payable out of the surplus fund that existed on January 1, 1911. Pursuant thereto payment was made in 1916 to the Sallie F. Moon Company of $47,325 and in 1917 of $94,650.

During the year 1917 the Sallie F. Moon Company paid to its stockholders dividends aggregating $38,035, of which $5,700 was paid to each of the three plaintiffs. Such dividends were substantially and in effect paid out of the moneys received from the Northwestern Lumber Company as above stated.

Due returns were made according to law by each of the said corporations and the relators as individuals of their respective incomes during the years in question.

Each of the relators claimed a deduction from his income subject to taxation to an extent of $5,322 from the $5,700 received from the Sallie F. Moon Company. Such several claims for deductions were allowed by the board of review of Eau Claire county on due hearing, thereby overruling the assessment made against such relators by the supervisor of assessors. The supervisor thereupon appealed to the tax commission of Wisconsin, and on the hearing before said body the action of the board of review was reversed and the assessment made by the supervisor of assessors con-

firmed. Thereupon the relators obtained a writ of *certiorari* from the circuit court for Eau Claire county to review such determination of the tax commission. Upon hearing in the court below it was adjudged that the assessment as taxable income made against each of the relators for the year 1917, so far as it was based on the dividend of $5,700 received from the Sallie F. Moon Company, must be vacated and set aside.

From the judgment so entered an appeal was taken to this court by the county clerk of Eau Claire county and by him as clerk of the county income tax board of review for said county.

For the appellant there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the respondents there was a brief by *Bundy & Wilcox* and *P. M. Beach,* all of Eau Claire, and oral argument by *C. T. Bundy.*

ESCHWEILER, J. The appellant contends that the money paid to the plaintiffs as stockholders of the Sallie F. Moon Company and designated as dividends is taxable income of the relators although the source of such dividends is a surplus accumulated prior to 1911 by the Northwestern Lumber Company and paid out by it to the Sallie F. Moon Company in 1917 as a result of severally declared dividends by the Northwestern Lumber Company in 1916.

The income tax law provides for the levying of a tax upon annual incomes. Sub. 2, sec. 1087*m*—2, Stats., in defining the term "income," so far as material here now reads as follows:

"(b) All dividends derived from stocks and all interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever, *provided, that the term 'dividends' as used in this section shall be held to mean any distribution made by a corporation, joint-stock company or association, out of its*

earnings or profits accrued since January 1, 1911, and paid to its shareholders whether in cash or in stock of the corporation, joint company or association."

The italicised portion of said sub. 2 (b) was added to the statute as it then stood by ch. 247, Laws 1917, approved May 21st.

The word "dividend" as used in the subsection prior to the amendment had been construed in *Van Dyke v. Milwaukee,* 159 Wis. 460, 159 N. W. 509, to mean that "ordinary dividends declared by a going corporation, including mining corporations, will be conclusively presumed as against stockholders to be from earnings or profits for purposes of income taxation." Page 464.

In *State ex rel. Bundy v. Nygaard,* 163 Wis. 307, 158 N. W. 87, the word "income" as used in the statute before amendment was defined to be "profit or gain derived from capital or labor, or from both combined. . . . It must be gain or profit."

Subsequently the cases of *State ex rel. Pfister v. Widule,* 166 Wis. 48, 163 N. W. 641 (decided in June, 1917), and *State ex rel. Sallie F. Moon Co.* (a Wisconsin corporation) *v. Wis. Tax Comm.* 166 Wis. 287, 288, 163 N. W. 639, 165 N. W. 470 (decided in December, 1917, but argued in May of that year), repeated what was said in the *Van Dyke Case, supra,* as to the definition given to the word "dividend."

We construe the legislative definition now applicable to the term "dividend" as it stands in the amended sec. 1087*m*—2 as intended to now permit the opening of the door of inquiry as to the source from which came the money paid by a corporation to its stockholders, although designated by it as dividends, the door which was in effect declared in the prior cases completely closed. The result now is that a stockholder in any corporation to whom, as stockholder, there has been paid a sum of money under the designation of dividends has the right to show that such

payment or dividend was made out of capital or surplus and therefore not taxable, instead of out of earnings or profits accrued since January 1, 1911, which would be taxable. That the fund in question passes through the treasury of the Sallie F. Moon Company after leaving that of the Northwestern Lumber Company and before reaching the hands of the relators does not change the nature of the transaction. At no time on its passage from the first company to the relators does it meet the present definition of the dividend which is to be considered as part of the taxable income of an individual.

It follows that when, as here, the fund in question does not meet the definition of taxable income, it is unnecessary to consider the language of the same law providing for deductions and exemptions, for they are properly considered only in reference to that which would otherwise be taxable income.

Giving the words "earnings" and "profits" their plain, every-day meaning, the payments in question here are not profits or earnings accrued since January 1, 1911, to the Sallie F. Moon Company and therefore do not meet the present statutory definition of taxable income. The trial court was therefore right in his conclusion.

By the Court.—Judgment affirmed.

WINSLOW, C. J., and SIEBECKER, J., dissent.

NOER, Respondent, vs. G. W. JONES LUMBER COMPANY, Appellant.

December 2, 1919—January 13, 1920.

Physicians and surgeons: Action for compensation: Workmen's compensation: Jurisdiction of industrial commission.

A physician's right to resort to the courts to enforce by action his claim against an employer for whom the physician has performed services in caring for an injured employee at the

employer's request, is not affected by sub. 2, sec. 2394—15, Stats., giving the industrial commission exclusive jurisdiction to pass upon the reasonableness of medical bills of the employee, the statute applying only in cases where such issue is between employer and employee.

APPEAL from a judgment of the circuit court for Forest county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This action was begun in justice's court to recover the value of physician's services. Upon appeal to the circuit court judgment was rendered in favor of the plaintiff, from which judgment this appeal was taken.

Appellant is under the provisions of the workmen's compensation act. The respondent is a physician and surgeon at Wabeno, Wisconsin, and owns and operates a hospital in connection with his practice. Prior to September 1, 1917, at which time sub. 3, sec. 2394—15, Stats. (ch. 624, Laws 1917), providing that no employer subject to the provisions of the workmen's compensation act shall solicit, receive, or collect any money from his employees or make any deduction from their wages, either directly or indirectly, for the purpose of discharging any liability under the provisions of said law, nor sell to an employee, or solicit or require him to purchase, medical or hospital tickets or contracts for medical, surgical, or hospital treatment required to be furnished by such employer under such law, became effective, the plaintiff rendered medical services to the employees of the appellant under a contract plan whereby each employee paid him a certain amount each month. Upon the enactment of said sub. 3 it was considered that the then existing arrangement could not be continued. It appears that plaintiff was employed by the appellant to continue to render medical services to employees of the company sustaining injuries while in the employ of the company and for which the company was liable for compensation under the workmen's compensation act. This action was brought to recover for services rendered in treating.

and furnishing hospital accommodations to, an employee of the company injured under circumstances making appellant liable for compensation. In due time the appellant settled with the injured employee. Plaintiff presented his bill for medical services, and payment was refused on the ground that it was excessive, and a request was made that the matter be referred to the industrial commission for adjustment, which was refused by plaintiff, and this action was instituted to recover the amount of the bill.

For the appellant there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *C. J. Otjen.*

For the respondent the cause was submitted on the brief of *G. H. Dawson* of Crandon.

OWEN, J. It seems to be appellant's contention that, because it and its employees were subject to the provisions of the workmen's compensation act, the industrial commission has exclusive jurisdiction (subject to the judicial review provided for in the act) to pass upon the reasonableness of plaintiff's charges and to fix and determine the reasonable value of plaintiff's services rendered to the injured employee, for which appellant was liable only by virtue of the provisions of the workmen's compensation act, and that the court has no jurisdiction of the action. Reference is made to the provisions of the workmen's compensation act, sec. 2394—9, which provides that compensation shall include such medical, surgical, and hospital treatment, medicines, medical and surgical supplies, crutches, and apparatus as may be reasonably required for ninety days immediately following the accident, etc.; also sec. 2394—15, which provides that any dispute or controversy concerning compensation under secs. 2394—3 to 2394—31, inclusive, shall be submitted to said industrial commission in the manner and with the effect provided in secs. 2394—3 to 2394—31, inclusive, and that the industrial commission shall have jurisdiction to pass upon the reasonableness of the medical

and hospital bills in all cases of dispute where compensation is paid, in the same manner and to the same effect as it passes upon compensation.

From these provisions it is argued that, the services for the value of which this action was brought having been rendered to an injured employee at the request of the employer, no liability existing on the part of the employer to furnish such services except by virtue of the workmen's compensation act, all of which was known to the plaintiff, exclusive jurisdiction is vested in the industrial commission to pass upon the reasonableness of the charges made for such services, and that plaintiff may not maintain an action at law to recover therefor. This contention is unsound. The workmen's compensation act deals exclusively with matters growing out of the relation of employer and employee. The provisions of the act are binding upon employers and employees electing to be bound by them, and upon none others. All except employers and employees are strangers to the act, and their usual lawful rights and remedies are unaffected by it. True, it is made the duty of the employer to provide certain medical attention to its employees, but the act does not provide that he who renders such medical services at the request of the employer must submit the reasonableness of his charges in that behalf to the industrial commission for its approval and allowance. The physician rendering such services is no more deprived of his right to resort to the courts for the establishment and collection of his claim than though the services had been rendered to the employer personally. The fact that neither employer nor employee, those for whom the act was primarily designed, are affected by its provisions against their consent, coupled with the further consideration that no method is provided by which a physician may consent to be bound by the terms of the act, would strongly negative the inference that the act was intended to have the effect for which appellant contends.

Sub. 2, sec. 2394—15, which provides that the industrial commission shall have jurisdiction to pass upon the reasonableness of medical and hospital bills in all cases of dispute where compensation is paid, in the same manner and to the same effect as it passes upon compensation, confers upon the industrial commission authority to pass upon and determine the amount which the employer shall pay the employee where the employer has failed in his duty to provide proper medical attention, and which was provided by the employee himself, as was the case in *Milwaukee v. Miller,* 154 Wis. 652, 144 N. W. 188. Under such circumstances the reasonable value of the services, as determined by the industrial commission, measures the amount which the employer must pay to the employee for this item of compensation, but the physician rendering the services is in no manner bound by such determination when he proceeds to collect from the employee. His remedy in the courts is left unimpaired, and he may maintain his action therein for the value of his services as he conceives them to be. Having discovered no legislative attempt in the workmen's compensation act to deprive physicians rendering services under circumstances here presented, of their legal rights and remedies, we find it unnecessary to consider the question of the power of the legislature to confer upon the industrial commission the exclusive jurisdiction for which appellant contends.

It follows that the court had jurisdiction of the action, and, no other error being assigned, the judgment should be affirmed.

By the Court.—Judgment affirmed.

MADLER, Administrator, and others, Respondents, vs. KERSTEN and wife, Appellants.

December 2, 1919—January 13, 1920.

Action to quiet title: Proof of title: Deed from grantor not in possession: Pleading: Defense not withdrawn: Tax certificate as real property: Assignment by trustee who has not qualified by giving bond: Specific performance: Contract made by attorney: Authority.

1. An action to remove a cloud on title to real estate can only be maintained by one who shows title in himself, either legal or equitable, or shows that he has a lien or incumbrance on the land; and the plaintiff, not tracing title to the government, does not prove title by virtue of a deed from a person not shown to have been in possession.
2. Where in such an action defendant put the title in issue by answer, the fact that thereafter the active litigation centered about the validity of a tax deed held by defendant did not deprive defendant of his defense of no title, there being no affirmative withdrawal and no act misleading plaintiff as to defendant's position.
3. A tax certificate is real property (*Eaton v. Manitowoc Co.* 44 Wis. 489, followed), and is not assets in the hands of an executor but passes to the heirs.
4. Where testator devised real property in trust with directions to sell, an assignment of the tax certificate in form by the executor, who was also a trustee, would not be valid even if the assignment were ascribed to the trustees, they not having given bond as such under sec. 4025, Stats.
5. A claim that by letters passing between the holder of the deed and his attorney and the attorney for plaintiffs a specifically enforceable agreement was made out to deed back the land. regardless of the validity of the tax deed, in consideration of offered reimbursement, is not proved where there is no showing that the attorney had authority to make such an agreement.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Action to remove a cloud upon the title to real estate. The plaintiffs are the administrator and the heirs at law of one Thomas McFarlin, deceased. The land consists of a

forty-acre tract of unoccupied land. The cloud consists of a tax deed issued to the defendant *Frank L. Kersten.*

The deed is attacked on account of several irregularities, set forth in the complaint, as well as upon the ground that the certificate of tax sale on which it was issued never was assigned to or owned by the defendant and hence that the tax deed to him was void. The action was tried by the court without a jury. The complaint alleged ownership in fee of the land in question by the heirs at law of Thomas McFarlin, and the answer denied such ownership. The facts material on this appeal are not seriously in dispute. The plaintiffs did not trace title from the government, but contented themselves with showing that one Amelia Gruber deeded the land to Mary Ann McFarlin August 18, 1902, that Mary Ann McFarlin's will was duly probated February 13, 1912, by which she devised all her property to Thomas McFarlin, and that Thomas McFarlin thereafter died intestate, leaving the plaintiffs (except the administrator, *Madler*) as his heirs at law. No possession of the property in question by any one at any time was shown. The proof further showed that the lands were sold for taxes May. 17, 1910, to Theodore Kersten, who thereafter died intestate still owning the certificate; that the will was duly probated in October, 1914, and that by its terms all the testator's real estate was devised to Rev. Theodore H. Kersten and Verona C. Kersten as trustees, with directions to sell the same and (after paying one bequest of $1,000) divide the proceeds into seven equal shares to be distributed among his seven children; that Theodore H. Kersten was named as executor in the will and duly qualified as such a few days later; that said executor in form assigned the said tax certificate to the defendant *Frank L. Kersten* February 5, 1915, by indorsing the same as follows: "Rev. Theo. H. Kersten, as executor of the estate of Theodore Kersten, deceased," and by manual delivery of the certificate; that *Frank L. Kersten* presented the certificate to the county

clerk with an affidavit of nonoccupancy, and received a tax deed of the premises February 5, 1915, which is the deed attacked in this action. It further appeared that in July, 1915, the plaintiffs, learning that a tax deed had been issued to the defendant, sent a letter to him, through their attorney, offering to reimburse him for the taxes paid, interest, and all expenses, and stating that if the offer was not accepted action would be commenced to set aside the deed on account of defects in the tax proceedings; that defendant replied by letter stating that he had sent plaintiffs' letter to his attorney and would direct him to communicate with the plaintiffs at once; that a few days later Mr. Scudder, the defendant's attorney, replied to the plaintiffs' letter, stating that the taxes paid and interest and expenses amounted to $18.21, on receipt of which the defendant and wife would execute to the plaintiffs a quitclaim deed; that on the following day Mr. Scudder sent another letter stating that, as a condition of making the quitclaim deed, the plaintiffs must point out the defect in the tax proceedings which vitiated the deed; that on the same day the plaintiffs' attorney wrote, saying that the first proposition was accepted and the quitclaim deed and money would be forwarded in a few days; that two days later plaintiffs' attorney wrote, in answer to Mr. Scudder's second letter, that the assignment of the tax certificate was not according to law and that there were other defects; that the money was forwarded by draft about a week later and was returned by the defendant because the defects in the tax deed had not been stated.

On these facts plaintiffs claimed that a valid contract to convey the lands had been made and that they were entitled to specific performance thereof even if the tax deed should be held valid.

The trial court held that the plaintiffs had title to the land; that the tax certificate never was legally assigned to the defendant because the same was real estate and hence

could not be assigned by the executor as such but passed to the devisees under the will, hence that the defendant's tax deed was void; that there was no sufficient proof of the posting of the notices of the tax sale in question; that there was no case made for specific performance; and that the plaintiffs were entitled to judgment declaring the tax deed void and barring the defendants from all claim of right or title to the premises. From judgment in accordance with these conclusions the defendants appeal.

For the appellants the cause was submitted on the brief of *Henry T. Scudder* of Marinette.

L. P. Fox of Chilton, for the respondents.

WINSLOW, C. J. It is evident that the plaintiffs proved no title to the lands in question. A deed from one not shown to have been in possession of the land is no proof of title. *Hamilton v. Beaudreau,* 78 Wis. 584, 47 N. W. 952; *Cartwright v. Hall,* 88 Minn. 349, 93 N. W. 117. An action to remove a cloud from the title can only be maintained by one who shows title in himself, either legal or equitable, or at least shows that he owns a lien or incumbrance on the land. Sec. 3186, Stats.; *Kimball v. Baker L. & T. Co.* 152 Wis. 441, 140 N. W. 47. This seems to be simply good common sense, and good common sense is frequently law. The trial judge disposed of this difficulty by saying that the defendants did not at any time question the original ownership of the property but only the validity of the tax deed. The record, however, shows that plaintiffs' title was put in issue by the answer, and we have found nothing in the bill of exceptions showing that the issue so raised was ever waived or abandoned. It is true that the active litigation centered about the validity of the tax deed, but, in the absence of some affirmative withdrawal of the defense of lack of title or some act misleading the other party as to his position, the defendant may still stand upon his defense.

A tax certificate is real property. This was decided in *Eaton v. Manitowoc Co.* 44 Wis. 489, and the decision there made has never been overruled and has become a rule of property. Being real property, the tax certificate in the present case did not become assets in the hands of the executor and hence could not be assigned by him to the defendant; but passed to the trustees to whom the real estate was devised by the will, who, however, would have no authority to execute the trust until they had given bond as trustees under sec. 4025, Stats. *McWilliams v. Gough,* 116 Wis. 576, 93 N. W. 550.

The defendant therefore acquired no title to the certificate by the attempted assignment. Having no title to the certificate, the tax deed to him was clearly void.

It is evident that there ought to be a new trial in order that the plaintiffs have opportunity to prove title to the premises. If they do so they will be entitled to judgment removing the cloud on their title resulting from the void tax deed upon payment into court for the benefit of the said trustees of the amounts required to be paid by sec. 1210*h*, Stats.

We agree with the trial court upon the proposition that there can be no judgment of specific performance of the alleged contract to convey, resulting from the correspondence with the defendants' attorney, for the reason that there is no proof, either oral or written, that the attorney had authority to make such a contract.

By the Court.—Judgment reversed, and action remanded for a new trial.

LIPPERT and wife, Respondents, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

December 2, 1919—January 13, 1920.

Eminent domain: Railroads: Damages from increased use of switch track: Depreciation of adjacent property: Damages.

1. The owner of land in a street on which a switch track had long been in use is not entitled to damages for the increased use of the switch track resulting from the use of a new spur track constructed on such street.
2. The owner of a small triangular piece of land taken by a railroad in the construction of a spur track can recover only for the depreciation resulting to the property from which the piece is taken, and is not entitled to damages for depreciation in value of other property wholly independent and separate from that actually taken.

APPEAL from a judgment of the circuit court for Kenosha county: BYRON B. PARK, Judge. *Reversed.*

This action was brought by the plaintiffs to recover damages for alleged depreciation of and damage to certain property of theirs by reason of defendant's building a spur track on a strip of land which took from plaintiffs a small triangular piece containing about ten and three-quarters square feet.

Condemnation proceedings were begun by defendant on September 9, 1916. The commissioners in the proceedings awarded the plaintiffs the sum of $1,050. Both parties appealed to the circuit court. On the trial it was stipulated that the jury, by special verdict, should determine what portion of the plaintiffs' property should be considered in determining the amount of compensation to which the plaintiffs were entitled for depreciation by reason of the triangular piece taken for railroad purposes. The description of the several parcels into which plaintiffs' property was divided and used was also stipulated to be as shown by a plat offered in evidence and its use was apportioned as indicated thereon.

The jury, by a special verdict, found that on October 31, 1916, the fair market value of the triangular piece of land in Pearl street, and subject to this public easement, condemned and taken by the *Chicago & Northwestern Railway Company* for its use, was $50; that the fair market value of the south seventy-five feet of the southeast quarter of block 18 in the Sixth ward of Kenosha, owned by the plaintiffs, not taken for railroad use, was depreciated by the taking of the triangular strip to the amount of $2,850; that the part of the depreciation to be apportioned and assessed to the tenement property, embracing forty-seven feet frontage on Pearl street, is $950; that the part of the depreciation to be apportioned and assessed to the brick homestead property, embracing eighty-six feet frontage on Pearl street, is $1,900.

Judgment was entered for $2,900, with interest and costs, from which judgment the defendant appeals.

R. N. Van Doren and *D. E. Riordan,* both of Milwaukee, for the appellant.

For the respondents there was a brief by *Buckmaster & Hammond* of Kenosha, and oral argument by *A. E. Buckmaster.*

SIEBECKER, J. The question presented on this appeal is: Did the court err in awarding recovery for any depreciation of the plaintiffs' homestead property, embracing the eighty-six feet frontage on Pearl street, by reason of the condemned small triangular piece of plaintiffs' property, amounting to about eleven square feet, lying in Pearl street and being a part of the southwest forty-five feet of the southeast quarter of block 18, abutting on Pearl street and adjoining the plaintiffs' homestead?

As above stated, the plaintiffs, as owners of the quarter of block 18, divided it into three parts, each part having on it a residential building. It is stipulated that only the parts occupied as homesteads and the double tenement building.

both of which front on Pearl street, are involved in this proceeding. The railroad company had occupied Pearl street with a switch track for many years before the triangular piece in question was condemned as a part of the right of way for a new branch switch track which connected with the old track in Pearl street in front of plaintiffs' premises. The original right defendant had acquired in Pearl street to lay and operate a switch track along this street entitled it to use such old track in connection with the proposed new spur track, and any increased use of the old track resulting from the use of the new spur track furnished no basis for a claim for damages to plaintiffs' property on account of laying the new spur track. In the light of the use to which plaintiffs devote the two properties they own fronting on Pearl street, can it be said that they are used as a unit so that each is dependent and related to the use of the other, or are they devoted to separate and distinct uses, so as to constitute independent properties as far as they are affected by this railroad in Pearl street? It is stipulated that the north part of the plaintiffs' property in the quarter of the block owned by them, and used as a tenement, is not so situated as to be united in use with the properties here in question as to entitle plaintiffs to damages in this condemnation proceeding. The uses of the homestead dwelling and the tenement abutting on Pearl street are wholly separated and independent and constitute in fact divided parcels of land, and each is put to the use for which it is best adapted. This separation of the properties is as complete as it would be if owned and occupied by different persons. Under these conditions, which are undisputably shown by the evidence, we are of the view that the trial court erred in holding that the homestead and the tenement properties fronting on Pearl street are a unit in use and occupation and constitute one property for the purposes of the condemnation proceeding. Their location, use, and separation make them separate and independent par-

cels of ground and entitle plaintiffs to recover damages by way of depreciation to only the forty-five foot parcel constituting the double tenement dwelling house property from which the triangular piece is taken for railroad purposes.

Looking at the actual situation as presented by the evidence, and the different purposes and uses to which the plaintiffs devote these properties, from a practical and common-sense point of view it must be held as a matter of law, in the light of the adjudications in this court, that plaintiffs can recover in this proceeding only for the depreciation resulting to the tenement property from which the triangular piece was taken. We consider that this result is sustained by the rule and the reasoning of the following cases: *Bigelow v. West Wis. R. Co.* 27 Wis. 478; *Robbins v. M. & H. R. Co.* 6 Wis. 636; *Welch v. M. & St. P. R. Co.* 27 Wis. 108.

The judgment is erroneous in awarding recovery of the $1,900 as depreciation of the homestead property. Judgment should have been awarded as asked for by the defendant, namely, that plaintiffs recover damages in the sum of $1,000, less the costs of the action, pursuant to sec. 1849, Stats.

By the Court.—Judgment reversed, and cause remanded to award judgment in plaintiffs' favor for the balance, after deducting the defendant's costs of action, from the $1,000 plaintiffs are entitled to recover.

JOHN A. TOLMAN & COMPANY, Respondent, vs. INFUSINA and others, Appellants.

December 3, 1919—January 13, 1920.

Guaranty: Consideration: Bond guaranteeing payment of past indebtedness: Fraud: Failure of obligee to advise guarantors of existing debts of principal: Evidence: Contract under seal: Appeal: Reversal.

1. Where a salesman's bond guaranteed the payment to his employer not only of all moneys collected by and advanced to him, but also of "any and all indebtedness now due" his employer from him, the employer's failure to inform the sureties that the salesman was already indebted to it at the time they signed the bond was not a fraudulent concealment where the employer had no communication whatever with the sureties before they signed.
2. Under sec. 4195, Stats. 1898, guarantors signing a bond which was under seal and recited a consideration were entitled to show want of consideration, the bond being given for a past indebtedness.
3. There must be a new consideration moving either to the principal or to the sureties, or to both, or a detriment to the obligee, for a bond guaranteeing the payment of a past indebtedness of the principal.
4. On appeal by sureties on a guaranty bond, the error of the judge in refusing to find on the issue whether the bond was given for a past indebtedness, and, if so, whether any consideration moved from plaintiff to the sureties or to the principal, is ground for reversal and a new trial pursuant to sec. 2405*m*, Stats. 1917.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed as to appealing defendants.*

Action upon bonds to indemnify plaintiff from any loss sustained through the principal, who was its salesman. The material portion of the second bond, which is the only one involved in the appeal, is as follows:

"This memorandum witnesseth, that *John A. Tolman & Company* has contracted with John C. Peterson as salesman, and otherwise, and in consideration of the sum of one

dollar, and other valuable consideration received from said company, the receipt of which is hereby acknowledged, I hereby guarantee the payment to said company of any and all moneys collected by him on account of said company, and of all moneys which said company may from time to time advance to him, and any and all indebtedness now due or which may hereafter become due to said company from him."

The bond was under seal. A former bond was signed by other sureties, and judgment for the amount found due from Peterson went against them also as well as against the principal. Only the sureties upon the second bond appealed.

For the appellant *Infusina* there was a brief by *Heck & Krenzke* of Racine, and oral argument by *Charles Krenzke*.

Vilas H. Whaley of Racine, for the appellants *Brown, Born,* and *Davis*.

For the respondent there was a brief by *Thompson, Myers & Kearney* of Racine, and oral argument by *Thomas M. Kearney*.

VINJE, J. In their answers and upon the trial the appealing defendants claimed that the bond was given for a past indebtedness due plaintiff from Peterson; that no consideration moved from plaintiff to the sureties or to Peterson; and that the sureties were induced to sign the bond through fraudulent concealment of facts known to it but not to them, to the effect that Peterson was a defaulter. The trial court found against them upon the latter point. The alleged fraud consisted in plaintiff failing to inform the sureties of the fact that Peterson was already indebted to it at the time they signed the bond and that plaintiff had reason to believe that Peterson was a defaulter. Plaintiff had no communication whatever with the sureties before they signed. Under the rule of *John A. Tolman Co. v. Butt,* 116 Wis. 597, 93 N. W. 548, the finding of the trial court must be sustained.

The court, though requested to do so, refused to find

upon the issue of whether or not the bond was given for a past indebtedness, and the court made no finding as to whether or not there was a consideration for the bond. In its decision it stated: "I think the question of want of consideration is not open and is concluded by the recitation in the guaranty contract regarding consideration." If by this the court meant that defendants could not show want of consideration, then it was mistaken, for sec. 4195, Stats. 1898, in force at the time this bond was signed, provides, "A seal upon an executory instrument hereafter executed shall be received as only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument was not sealed." See, also, *Carey v. Dyer,* 97 Wis. 554, 73 N. W. 29. If the court meant that since no evidence had been introduced showing a want of consideration then the recitals in the bond controlled, it was correct. The law is well settled that there must be a new consideration moving either to the principal or to the sureties, or to both, or a detriment to the obligee, for a bond guaranteeing the payment of a past indebtedness of the principal. 21 Ruling Case Law, 959, 960; 20 Cyc. 1413; *Bank of Commerce v. Ross,* 91 Wis. 320, 64 N. W. 993.

Owing to the failure of the court to find upon the issue whether the bond was given for a past indebtedness, and, if so, whether any consideration moved from plaintiff to the sureties or to Peterson, we conclude that justice in this case has not been done, and that pursuant to the provisions of sec. 2405*m,* Stats. 1917, we must reverse the judgment as to the appealing defendants and send the case back to take further evidence, if either party desires it, upon the above issues not found, and for findings thereon and judgment in accordance with the findings made.

By the Court.—Judgment reversed as to appealing defendants only, and cause remanded for further proceedings according to the opinion.

ESTATE OF JOHNSON.

December 3, 1919—January 13, 1920.

Wills: Evidence as to signature and testamentary intent: Residuary legatee as competent witness: Testimony of bystanders: Declarations of testator subsequent to making his will: Proof of contents of lost will: Public policy to effectuate wishes of testator: Question on appeal: Allowance of fees to handwriting experts.

1. In proceedings for the probate of a will, the evidence is *held* to show that testator had signed the instrument, though there was a conflict in the expert testimony on handwriting, there being eye-witnesses to the act of signing, and also to show that he had signed the instrument with testamentary intent and not as a joke or without serious intention.
2. Under secs. 2284, 4068, Stats., as they stood in 1895, a residuary legatee was a competent subscribing witness to a will, the common-law disqualification being wiped out and sec. 4069 not being applicable to the act of witnessing a will.
3. It is public policy to effectuate, where possible, the wishes of a testator.
4. Testimony of bystanders at the time of signing the will, though not subscribing witnesses, was properly received on the issue as to the genuineness of testator's signature, they having testified to having seen the instrument so signed by him.
5. On appeal from a judgment admitting a will to probate, contested for lack of genuineness of testator's signature, the only question at issue is whether or not the instrument propounded as a will should be admitted to probate.
6. Post-testamentary declarations of testator to the effect that he had made a will and for the benefit of proponent were admissible in proceedings to probate the will.
7. Such declarations are also admissible to prove the existence or contents of a will alleged to be lost.
8. In the absence of statutory authority the probate court improperly allowed fees for services and expenses of proponent's handwriting expert to be paid out of the estate, particularly in view of sec. 4041*b*, Stats., expressly justifying the allowance from the estate of proponent's counsel fees.

APPEAL from a judgment and two orders of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed as to the judgment and one order; reversed as to the other order.*

This appeal is from two orders subsequent to and from a judgment of the trial court reversing a judgment of the county court of Racine county. The county court refused and the circuit court granted probate of the following writing alleged to be the last will and testament of one *Theodore W. Johnson,* deceased:

"September 6th, 1895.

"This is the will of Theodore W. Johnson. *Mrs. L. C. Hahn* is to take entire charge of all moneys or anything I leave or have. But first she is to see that all my debts are paid. Then he wants Katie Marten to have $500 for being so good to him. After this Nellie Newport is to get $200. After this Mrs. Cane next door is to get $200. To Mr. J. Wilson $200, then to Mr. C. P. Hanson $87 and what interest the law allows. Then to *Mrs. L. C. Hahn* for kindness to me and after attending faithfully to my wishes I leave to her all moneys there is left or whatever else belonged to me.

"William J. Hahn. THEODORE W. JOHNSON.

"L. C. Hahn."

And on the page opposite thereto, in *Mrs. L. C. Hahn's* handwriting, as was the body of the instrument itself, was the following: "And I am to see that his grave is kept green—not Irish. And to little Goldie Locks, she is to have $5 worth of chocolates."

All this was done with an indelible leadpencil in a small account book of about eight by three and one-half inches in size.

Johnson died at Racine March 3, 1917, unmarried, and then about sixty-four years of age. Shortly thereafter the public administrator of Racine county, *John D. Rowlands,* contestant and appellant herein, was granted administration of the estate. A search disclosed assets aggregating at the time of the hearing in the court below about $83,000, all in personal property, except one small piece of real estate appraised at about $2,500.

Johnson came from Denmark to this country at the age of about eighteen and lived in Racine substantially all the time thereafter. He was eccentric in his ways, penurious,

and very secretive as to his personal matters and family affairs. He originally was a shoemaker, then ran a small shoe store, and after a few years traded that for a small farm, and thereafter devoted his time to the purchase and sale of real estate and securities. In the last years of his life he occupied for living quarters a small room in the upper story of an old store building. He was removed to the local hospital a few days before his death, leaving in his unlocked room a satchel unlocked in which were found the promissory notes and land contracts constituting his estate. The mortgages securing the payment of such notes were found in an unlocked trunk in a small room in the rear of the one building that he owned. There were in force at his death upwards of fifty mortgages and contracts mostly in his handwriting. No letters or papers were found among his effects purporting to be from or concerning any relatives. He carried one or more bank accounts for many years prior to his death.

The proponent, *Mrs. L. C. Hahn,* in 1895 and some time prior thereto, had been conducting a millinery shop on Main street in Racine. Mr. Johnson at that time was living near there and taking his meals at the house of a Mrs. Cane, one of the beneficiaries named in the instrument. He was quite a frequent visitor at *Mrs. Hahn's* place of business. For some time prior to September, 1895, he suffered from boils, carbuncles, and running sores which needed frequent attention. Help in giving such attention and dressing the sores had been given by *Mrs. Hahn* as well as by Miss Katie Marten and Miss Nellie Newport, both employees of *Mrs. Hahn,* and also mentioned in said instrument. The circumstances surrounding the alleged signing are related by the subscribing witness William J. Hahn and quoted by appellants in their brief. After telling of the witness's arrival at *Mrs. Hahn's* store and of the deceased speaking to him, he proceeds as follows:

"Laying his hand on Kitty Marten's shoulder he [John-

son] says: 'This girl has just saved my life.' And I said, 'In what way?' He says: 'Why, she has been doing for me all the time, and taking care of me.' I said: 'Well, if she has, why don't you do something for her? Why don't you leave her something; do something for her,' and, as the phrase was, I remember saying: 'Leave her your old shoes.' And in return he said, 'Well, I will.' He says: 'I will make my will right now,' he says, 'if *Mrs. Hahn* will write it.' Of course we all looked up surprised, and *Mrs. Hahn* said: 'All right.' She turned to her little cash book—we were all standing around the desk—and she wrote as he dictated, just as is written in that book. Then after it was all written he took it, read it over, and he signed it; then handed the book to me, and he said: 'Mr. Hahn, you sign that.' I says: 'All right.' And he asked *Mrs. Hahn* to sign it; and that is all that was said at the time, that I remember."

The same witness further testified in substance:

"I used the pencil attached to the book, and Johnson and *Mrs. Hahn* used the same pencil, and it was all done at that desk. *Mrs. Hahn* signed next. I saw her sign. It took about thirty minutes to three quarters of an hour for Johnson to dictate and *Mrs. Hahn* to transcribe the instrument. I don't know as there was any talk going on at the time. Johnson would dictate and stop and think and go on with the dictation and *Mrs. Hahn* would write until it was finished. *Mrs. Hahn* at one place stopped and asked him if there was not somebody else he wanted to leave something to, and he said no, that he had no relatives. Mr. Johnson said nothing about what the kindness consisted of in connection with the legacy to *Mrs. Hahn*. Everybody knew what he meant. After the document was signed by we three, nothing more was said; then we had a general conversation."

There was testimony to the effect that Johnson signed the instrument while he was standing at the end of a desk, the top of which slanted downward from him, the lower end about thirty inches from the ground; by artificial light; with a short indelible pencil; in a leaning position, and while still afflicted with boils on his neck and a running sore on

his leg (it being claimed that some or all of these things, particularly the condition of his neck, made him take a somewhat strained and unnatural attitude while writing his name).

There were also present at this time, according to the testimony, in addition to the two who signed as subscribing witnesses, the little child of *Mrs. Hahn,* referred to as Goldie Locks, the husband of the mentioned Mrs. Cane, who died prior to the trial, a Mrs. E. C. Thellar, a sister-in-law of *Mrs. Hahn* and then visiting from New York, the Miss Katie Marten mentioned in the will, and Marshall Forest, a friend of the Hahn family then living in the neighborhood. Forest subsequently moved to Arkansas, and, upon seeing in the Racine paper an account of the death of Mr. Johnson, caused a letter of congratulation to be sent to *Mrs. Hahn* on her being interested in the estate. The depositions of Forest and Mrs. Thellar were taken on behalf of the proponent.

The testimony disclosed that the account book in which the writing appears had been kept before and for several years after 1895 in *Mrs. Hahn's* store in connection with her business. *Mrs. Hahn* testifies that in 1900 she moved to New York and this note book was placed in a small paper box with some small articles belonging to her child and carried with them in a trunk to New York and brought back with the family on their return to Racine and stored in their home. After hearing of Mr. Johnson's death, she claims to have made a long search for it and finally discovered it still in the box within the same trunk. Immediately upon its being found she presented it for probate on April 10, 1917.

Upon the petition for the probate of said instrument as the will of Johnson, objections were interposed on behalf of *Mr. Rowlands* as administrator, and also on behalf of *Lars Hansen Christiansen* of Council Bluffs, Iowa, claiming to be a cousin and heir at law, and by the Danish consul

at Chicago on behalf of persons claiming to be foreign heirs, and all appellants herein.

Upon the first hearing testimony was offered by the contestants, including that of an expert on handwriting, to the effect that the signature purporting to be that of Theodore W. Johnson to the instrument was spurious, and the county court so held and for that reason denied probate. Upon appeal, trial was had in the circuit court for Racine county before a jury.

The proponent, *Mrs. Hahn,* was permitted to testify both in the county court and circuit court, over objections interposed by the contestants as to her competency to so testify as to the writing of the instrument, as to the facts and circumstances connected with the signing of the same and as to her acquaintance with the deceased.

The trial court submitted to the jury an advisory verdict of but one question of fact, which was answered to the effect that the signature of Theodore W. Johnson affixed to the writing in question was the genuine signature of Theodore W. Johnson.

The contestants moved to set aside the answer of the jury and for a judgment affirming the judgment of the county court and denying the will to probate. The court, upon such advisory verdict and upon the testimony, made findings of fact and conclusions of law in effect determining that the signature was genuine; that the will was properly executed; that *Mrs. Hahn* was a competent attesting witness to the same; and that said Marshall Forest and Mrs. E. C. Thellar were witnesses to the transaction; that the instrument should be allowed and probate thereof granted as the last will and testament of said Theodore W. Johnson, deceased; and that the order and judgment of the county court be reversed and the matter remanded to the county court for further proceedings according to law.

Subsequently, upon application on behalf of the proponent, the circuit court directed the allowance and pay-

ment out of the body of said estate of the sum of $382.86 for the services and expenses of a witness from Chicago, Illinois, called by the proponent as an expert on handwriting; and made a further order directing the payment in the same way of $475 to Mr. John B. Simmons, and a further sum of $645 to Mr. Wallace Ingalls, as counsel fees for services rendered by them on behalf of the proponent in said contest.

The contestants excepted to a refusal of the trial court to submit, on their request, an additional question for the determination of the jury worded as follows:

"(2) If your answer to question No. 1 is 'Yes,' then was it the intention of said Theodore W. Johnson, at the time of signing said writing, that the same should constitute and be his last will and testament?"

They also excepted to certain portions of the charge given by the court, to certain findings of fact, to the conclusions of law, and also to the refusal of the court to set aside the verdict of the jury and grant a new trial. They have appealed to this court from the judgment directing probate of the will and from the two several orders of allowance of fees to the expert witness and attorneys.

For the appellants there was a brief by *Thompson, Myers & Kearney* and *Hand & Quinn,* all of Racine, and *McCulloch & McCulloch* of Chicago, attorneys, and *Thomas M. Kearney, Jr.,* and *Elbert B. Hand,* both of Racine, and *Bertram W. Rosenstone* of Chicago, of counsel; and the cause was argued orally by *W. D. Thompson* and *Thomas M. Kearney, Jr.*

For the respondent there was a brief by *Wallace Ingalls,* attorney, and *Simmons & Walker,* of counsel, all of Racine, and oral argument by *Mr. John B. Simmons* and *Mr. Ingalls.*

ESCHWEILER, J. The contestants below, appellants here, raise two questions of fact: Was the signature of Theodore W. Johnson on the instrument in question genuine? and

Then, if so, was the instrument signed by him with the intention of making his will?

On the first question, in addition to William J. Hahn and the proponent, *Mrs. L. C. Hahn,* who testified as subscribing witnesses, Mr. Marshall Forest and Mrs. Etta C. Thellar testified directly to the signing of this instrument by the deceased at the time. Mrs. Katherine Kempel, who was the Katie Marten mentioned in the instrument, testified to having been present at the time of the alleged transaction and to having seen the writing in this book again on the following morning and to having called the attention of another of the then employees of *Mrs. Hahn,* a Mrs. Anna Becker, to it. The latter also testified to having seen the instrument on the following morning. Mr. Fred Hoernel, who at the time was employed in a hardware store one block east of *Mrs. Hahn's,* and a frequent visitor, testified to having had the book and the writing shown to him the next day by *Mrs. Hahn.*

A large number of checks, contracts, receipts, and releases in the register of deeds' office, all shown to have the genuine signatures of the deceased, were before the jury for their consideration and comparison with the signature in question and furnished plentiful ammunition for the very interesting, at least, battle of the handwriting experts.

Reproductions and enlargements of the signature involved and the concededly genuine ones were received in evidence. There is printed herewith the following:

No. 1, a portion of the instrument which was presented for probate with the questioned signature of Theodore W. Johnson and the signatures of Mr. and *Mrs. Hahn.*

Nos. 2, 3, 4, and 5 were signatures of Johnson on conveyances or instruments executed by deceased at the respective dates of August 1893, April 1894, March 1894, and No. 5 on September 10, 1895, being within four days of the date of the alleged will and described by contestants' expert as being a standard example of his then signature.

Some question was raised as to the possible difference in

the signature of an individual when using pen and ink or when writing with a leadpencil as in this case. No. 6 is a photograph of the leadpencil signature to a receipt given by Mr. Johnson in September, 1915.

Nos. 7 to 12 inclusive are further specimens of his signatures written at various times in 1894 and 1915 and also used for comparison.

Nos. 13, 14, and 15, respectively, were signatures on checks made in August 1899, April 1912, and January 1916, illustrative of his special form of signature to checks, and it is conceded that there was little change, if any, in the form of such signature during all those years.

From their study of the challenged signature above reproduced and of the above given and concededly genuine signatures of Johnson, as well as of the many others in the record, the handwriting experts on behalf of the contestants were positive in their conclusion that the document in question was not signed by Johnson. They base such conclusion upon the following among other things: the difference in the slant and form of the small *e* (being in the genuine signatures a vertical or Greek *e*); the form of the *n*, with rounding rather than sharp tops; in the spacing and connection of letters; in their slant; in the use of a round instead of an angular finish; then also the peculiar formation of the *W* and of the *T*; that the *T* was made with two upstrokes instead of a down-stroke as in the genuine signatures; the combination of the *T* and the *h* and of the *h* and *e*; again, in that the alignment and height of the letters is irregular and not like the genuine; that there are patches or amendments to several of the letters, particularly in the *h* in Johnson, indicating a manufactured signature; that the general picture of the questioned signature is not that of his genuine signature of that period.

The proponent's expert, on the other hand, arrived at his positive conclusion that the questioned signature was genuine from his study of the same signatures and for his

"I leave to her all money
there is left or what ever
else has belonged to
me
Theodore St. Johnson
[illegible]
[illegible]
1.

T. St. Johnson 2

Theodore W. Johnson 3

T. W. Johnson 4

Theodore W. Johnson 5

Theodore W. Johnson 6

Theodore W. Johnson 7

Theodore W. Johnson 8

Theodore W. Johnson 9

Theodore W. Johnson 10

Theodore W. Johnson 11

Theodore W. Johnson 12

Chas. Johnson 13

Chas. Johnson 14

Chas. Johnson 15

stated reasons, that while there was no admittedly genuine signature produced that could fairly be said to be the same in all particulars with that which appeared on the document here and that there was a pictorial dissimilarity between this and the genuine, yet there were such marked similarities and unconscious peculiarities to be found in both the questioned signature and the genuine ones as to warrant his conclusion. Among such reasons were, that he found a marked similarity in the slant of the letters; a peculiar irregular spacing between the letter *o* and the letters following it in both the first and last name; the formation of the *T;* the wider space between the initial *W* and the following name than there was between the same initial and the preceding name; an apparent difficulty in writing the *W;* the variant forms of the *J* used by the deceased; the evident change as time went on in such forms of that letter as well as of his *W's*. This expert says that the initial *T* was made with two downward strokes rather than with two upward ones as testified to on the other side. He sees also a patching of the small *h* as well as of the *s*, but neither indicates to him anything pointing to a forgery.

With the situation thus disclosed and upon all the evidence, we fully agree with the trial court in his opinion on this point wherein he says:

"I entertain no doubt that without the verdict of the jury the result would have been the same, because I think the positive testimony of witnesses whose integrity and credibility is otherwise unassailed is not outweighed or overcome by the testimony of handwriting experts who express opinions only. The testimony of honest witnesses who state that they know what they testify to is more convincing than theory. It is not likely that the testimony of the several witnesses who testify that they were present and know what took place would make up such a story. I do not positively know whether Johnson signed the writing in question; the handwriting experts do not know; but several witnesses testify that they do know and that he did sign it, and I have no hesitancy in concluding upon the competent

evidence in that behalf that he did and that it is the duty of the court to so find. It is not incumbent upon the proponent to establish beyond all doubt that Johnson signed this writing, but only to produce a preponderance of evidence in that behalf, evidence of greater convincing power than that produced by the contestants on the proposition involved, and I am satisfied this burden has been amply met."

We therefore see no grounds for reversing that conclusion.

On the second issue of fact contestants contend that the trial court should either have submitted question No. 2 proposed by them and quoted above, or should have found that if the deceased did sign the instrument it was not done with the intention of making it his will, but that it was rather in the nature of a joke or with no serious intention of taking so solemn a step as providing for the disposition of his property after his death.

According to the testimony of those claiming to have been present at the time after the body of the instrument had been finished and signed, then some jocular conversation took place between the parties, resulting in the writing being added by *Mrs. Hahn* on the opposite page as it is quoted above. We do not deem this subsequent incident of much significance.

Stress is laid by contestants upon what is claimed to be the unlikelihood of Johnson making such a disposition of his property as indicated in the instrument. It is true that there was no close friendship between the family of *Mrs. Hahn* and Mr. Johnson at any time, but apparently there was none such between the deceased and any one else. His was a solitary life by preference. Apparently he had cut himself off from all his relatives. He was without home ties then and during the rest of his life. He had been befriended and assisted by *Mrs. Hahn* and those associated with her in services of an unpleasant nature and rendered to him apparently without expectation of reward. So far as it now appears from the testimony, no one then believed

that what was being disposed of by the residuary clause would amount to any substantial sum. Certainly none then anticipated that whatever small amount of property the man possessed would, through what must have been his painful and persevering accretions, grow to the substantial amount now involved. Whatever it then was, it was his to dispose of as he saw fit, and nothing is shown of any subsequent desire to do otherwise. *Deck v. Deck,* 106 Wis. 470, 473, 82 N. W. 293. Its being left with *Mrs. Hahn* was certainly not inconsistent with a desire that she should benefit from it. He was not overcareful, to say the least, with his own papers, as shown by their condition at the time of his death. He did not need its possession in order to lawfully revoke, nor is there any ground for suspecting that it would not have been surrendered to him upon demand.

There is nothing in the record that would warrant us in saying that the instrument was not in effect what its plain and simple language purports to be. The conclusion of the trial court on this question of fact also cannot be disturbed.

Contestants present several questions of law for consideration.

First, that the instrument offered for probate was not attested and subscribed by two or more competent witnesses in accordance with the then provisions of sec. 2282, Stats., in that *Mrs. Hahn,* being designated therein a beneficiary, was not a *competent* witness thereto, thus leaving but one competent witness, viz. William J. Hahn.

Second, that though sec. 2284, Stats., then made any gift to a subscribing witness to such a will void, it did not make her thereby a competent witness.

Third, that *Mrs. Hahn* as a legatee has such an interest thereunder that she is further prohibited from testifying as to its execution by reason of sec. 4069.

Fourth, that under sec. 2282 a will cannot be proven by other than competent subscribing witnesses, and therefore

the testimony of Mrs. Thellar and Mr. Forest, not subscribing witnesses but present at the time, ought not to have been received or considered in determining the question as to whether or not the will had been executed.

Fifth, that the court erred in admitting testimony of alleged declarations and statements of Johnson subsequent to September, 1895, to the effect that he had made his will and for the benefit of the proponent.

Sixth, that there is no warrant for the allowance made for the services and expenses of the expert witness called by proponent.

It is freely conceded by both sides that the questions now before us are to be determined under the statutes as they stood and the law as it was in September, 1895, the time it is claimed the will was executed.

Sec. 2282 then read as follows:

"No will made within this state, except such nuncupative wills as are mentioned in this chapter, shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses; and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved."

Sec. 2284 read:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there be two other competent subscribing witnesses to the same; but a mere charge on the lands of the devisor, for the payment of debts, shall not prevent his creditors from being competent witnesses to his will."

Sec. 4069, so far as material here, read:

"No party, and no person from, through or under whom a party derives his interest or title, shall be examined as a

witness in respect to any transaction or communication by him personally with a deceased person, . . . in any civil action or proceeding in which the opposite party derives his title, or sustains his liability, to the cause of action from, through or under such deceased person . . . unless, . . ."

Sec. 4068 then read:

"No person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest in the event of the same, as a party or otherwise; and every party shall be in every such case a competent witness, except as otherwise provided in this chapter. But such interest or connection may be shown to affect the credibility of the witness."

In the Territorial Statutes of 1839 complete provisions were made both as to the required manner of the execution and of the proof of wills. One such (§ 25, p. 182), providing in substance the same as sec. 2284, *supra,* ended with these words: "and such person shall be admitted as a witness to the execution of such will or codicil, such devise, legacy, estate, interest, gift or appointment notwithstanding."

By the revision of 1849 this subject matter was rewritten into substantially the present form of secs. 2282 and 2284, *supra,* with the kindred statutes now found in ch. 103 of the Statutes, relating to wills, including sec. 2285, which saves to a subscribing witness, who in case of intestacy would take a share in the estate, such proportion of such share as would not exceed the specified provision of the will. In such revision, however, the words last quoted from the then sec. 25 were dropped out and no similar express provision subsequently appears in the Statutes.

From such omission contestants argue that the legislature thereby indicated an intention to revoke the former competency of such interested subscribing witness and to thereby reinstate the common-law rule that any one, either a party or witness, having a direct pecuniary interest in the event of the particular litigation was incompetent to testify therein.

The well established rule of the common law which disqualified such interested persons, either parties or witnesses, was strictly adhered to in this state except as modified by statute. *Smith v. Swarthout,* 15 Wis. 550, 552. Provisions had been made, however, from early days that an adverse party might be examined as a witness before trial or upon the trial on prior notice to that effect, either of which events qualified the other party to be examined on his own behalf, and also that a party might in certain cases be examined on his own behalf upon giving notice of intention so to do, and further provisions lifted the disqualification as to persons interested in certain public and other corporations.

That this common-law rule was firmly intrenched in this state is evidenced by the slow process by which it was removed.

The general lifting of this disqualification as to witnesses began by sec. 300, ch. 120, Laws 1856, providing: "No person offered as a witness shall be excluded by reason of his interest in the event of the action," but the following section thereto provided that such sec. 300 should not apply to *a party* to the action nor to any person for whose immediate benefit it is prosecuted or defended.

It was extended generally as to parties by sec. 50, ch. 137, R. S. 1858, wherein it was provided, "No person shall be disqualified . . . by reason of his interest in the event of the same *as a party or otherwise,* except in cases," etc.

Up to this time such relieving statutes had not been made applicable to criminal proceedings. By ch. 274, Laws 1861, the defendant in a criminal action for assault and battery was given the right to be examined as a witness in his own behalf where the assaulted person was a witness for the prosecution, and by ch. 72, Laws 1869, first appeared what is now in substance sec. 4071, Stats., permitting the accused, at his own request, in all criminal actions and proceedings to be a competent witness. This broadening of the relieving statutes to criminal as well as civil proceed-

ings seems first to have been carried into the general statute, what is now sec. 4068, by the revision of 1878, evidently to make it harmonize with the change of the law in 1869.

Giving due weight to any possible significance from the dropping of the phrase above quoted from the chapter on Wills of 1839 and the firmness with which the common-law rule was upheld in our practice, we are nevertheless constrained to hold that sec. 2284 as it stood in 1895 made *Mrs. Hahn* a competent subscribing witness, and that any common-law disqualification on the ground of her interest in the event of the litigation was wiped out by sec. 4068, *supra.*

To hold that sec. 2284, *supra,* merely made the gift void and left the witness still incompetent would make such statute an idle ceremony, for as against the loss to the designated beneficiary there would be no resulting benefit to any one else nor any promotion of the public policy so often declared of effectuating, where possible, the expressed wishes of a testator. *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; *Estate of Staab,* 166 Wis. 587, 166 N. W. 326.

Having reached this conclusion as to the effect to be given to sec. 2284, we cannot well avoid the further step that she is not excluded from so testifying by the provisions of sec. 4069, *supra,* as it is urged she is by contestants' third point above stated.

It has been held in former decisions that this particular statute does apply generally to the testimony of persons interested in the estate, the subject of the litigation in probate proceedings. *Goerke v. Goerke,* 80 Wis. 516, 519, 50 N. W. 345; *Valentine's Will,* 93 Wis. 45, 51, 67 N. W. 12; *Will of Pullen,* 166 Wis. 254, 258, 165 N. W. 25.

It is suggested *arguendo* only in *Goerke v. Goerke,* 80 Wis. 516, 520, 50 N. W. 345, that it might apply to the

testimony of subscribing witnesses to a will, but the point here involved has not been directly before the court in any former decision. Now being required to dispose of it, we are of the view that sec. 4069 does not apply to the particular form of such a transaction as is involved in the attesting of a will by becoming a subscribing witness thereto, and for the reason that such an act, if it be a transaction with the deceased, is nevertheless saved from the effect of that section by being the subject of particular and special consideration by secs. 2282 and 2284, *supra,* in the separate chapter on Wills. The same result was reached in the case of *Knutson's Estate* (Minn.) 174 N. W. 617, and *Hudson v. Flood,* 28 Del. 450, 94 Atl. 760, where a full discussion is found. To the same effect, also, *Wilson's Will,* 103 N. Y. 374, 8 N. E. 731; *Loder v. Whelpley,* 111 N. Y. 239, 245, 18 N. E. 874; *In re Kindberg,* 207 N. Y. 220, 226, 100 N. E. 789; *Brown v. Carroll,* 36 Ga. 568; *Henry v. Hall,* 106 Ala. 84, 101, 17 South. 187; *Vester v. Collins,* 101 N. C. 114, 7 S. E. 687.

Much reliance was placed by appellants upon the cases from Massachusetts, particularly *Crowell v. Tuttle,* 218 Mass. 445, 105 N. E. 980, that case holding that a designated beneficiary in such an instrument was not a competent and credible witness to the same. Such decisions, however, are not controlling here in view of the substantial difference under the Massachusetts law from that here, namely, that under the relieving statute of Massachusetts, similar to our sec. 4068, *supra,* it is expressly provided that such statute "shall not apply to the attesting witness to a will or a codicil." See secs. 13 and 15, ch. 131, Gen. Stats. Mass. 1860, and secs. 20 and 23, ch. 175, Rev. Laws Mass. 1902.

Having held that *Mrs. Hahn* was a competent subscribing witness, the objection urged under the fourth point to the admission of the testimony of Mrs. Thellar and Mr. Forest as to the execution of the will becomes immaterial.

Their testimony in any event was properly received on the issue being raised as to the genuineness of the signature of the deceased to the instrument in question, they having testified to having seen it so signed.

Upon the appeal from the judgment in this case the one question at issue and before us is as to whether or not the instrument propounded as a will should be admitted to probate. *Farmer v. Sprague,* 57 Wis. 324, 15 N. W. 382; *Will of Battis,* 143 Wis. 234, 126 N. W. 9. Whether *Mrs. Hahn,* being now held to be a competent subscribing witness, shall or shall not take under the will now admitted, or what effect, if any, the amendment to sec. 2284 which has been made since 1895 in striking out the word "subscribing" as it appears between the words "competent" and "witness," may have, is not necessarily or properly before us and we express no opinion thereon. Both sides in this litigation have expressly refrained from taking positions that might be subsequently embarrassing for manifestly cogent reasons, and we are satisfied to so leave the question. "Sufficient unto the day is the evil thereof."

The objection under the fifth point stated to the admission of post-testamentary declarations of deceased to the effect that he had made a will and for the benefit of the proponent cannot be sustained.

It is well established that subsequent declarations of a testator are admissible to prove the existence or contents of a will alleged to be lost. Cassoday, Wills, §§ 314, 325; *Valentine's Will,* 93 Wis. 45, 53, 67 N. W. 12; *Steinke's Will,* 95 Wis. 121, 126, 70 N. W. 61; *Gavitt v. Moulton,* 119 Wis. 35, 51, 96 N. W. 395; *Jones v. Roberts,* 96 Wis. 427, 433, 70 N. W. 685, 71 N. W. 883; *Aldrich v. Aldrich,* 215 Mass. 164, 170, 102 N. E. 487.

Being admissible on such issue, we see no reason why they are not equally admissible on the question here raised as to whether the propounded instrument was the genuine will of deceased.

We think the objection is well taken under the sixth point, to the allowance to be paid out of the body of the estate of fees for services and expenses of proponent's handwriting expert. Power to award costs in probate proceedings is entirely statutory. *Donges's Estate,* 103 Wis. 497, 513, 79 N. W. 786; 40 Cyc. 1362; *Sears v. Nahant,* 215 Mass. 234, 238, 102 N. E. 491.

No statute has been called to our attention, nor can we find any, that warrants the allowance of such an item. That the allowance out of the estate of proponent's counsel fees is based upon the legislative authority under sec. 4041*b* is quite a strong indication of the need of similar legislative authority for the allowance of such items as here in question.

The order admitting the instrument to probate being now upheld, the allowance to counsel for proponent was properly made.

By the Court.—The judgment of the circuit court granting probate of the instrument as the last will and testament of Theodore W. Johnson and the order allowing counsel fees are each affirmed. The order allowing compensation to proponent's witness is reversed; proponent to have her costs in this court.

KOLLENTZ, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

December 3, 1919—January 13, 1920.

Negligence: Railroads: Boy jumping on moving car: Contributory negligence.

While children of tender age are not held to that degree of care ordinarily exercised by adults, a boy thirteen years old, of ordinary intelligence, who jumped on moving cars and was struck by a dwarf signal near the track with which he was familiar, is contributorily negligent as a matter of law.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries sustained by plaintiff while attempting to board a moving freight train. The accident occurred in the yards of the defendant company at the Wilcox-street crossing in the city of Milwaukee. The evidence shows that for a number of years prior to the date of the accident persons of all ages freely used the right of way of the company at said point for the purpose of travel on foot; that persons between the ages of nine and twenty years habitually used the right of way of the company at that point for the purpose of play, and had been accustomed to climb upon moving freight trains for the purpose of riding thereon, all with the knowledge of the train crews, watchman, and flagman stationed at said point; that in the summer time, during the school vacation, this practice was indulged in daily and by a large number of children, frequently as many as a dozen riding upon one freight train and as many as a half a dozen or more riding on a single car; that the defendant company or its employees never at any time protested, objected, or in any wise warned or ordered these children off the property of the company, but that they let them thus freely climb upon and ride upon moving freight trains and cars at will, and that the company had made no rules or regulations directing or requiring its agents or employees to warn or prevent children or others from frequenting its right of way or boarding or riding upon its moving freight trains, and, in fact, did nothing to break up or prevent the practice and custom; that appellant, along with others, had freely and openly indulged in the practice for at least three years before the accident, and that no employee of the defendant company had ever warned him or ordered him to cease the practice.

On the day of the accident one of the defendant's switching trains was going south over the Wilcox-street crossing in charge of a regular switching crew at the rate of about ten miles per hour. When the train was less than a city

block north of the Wilcox-street crossing, appellant, together with four other boys, approached the crossing from the west, crossed over the tracks right past the watchman's shanty, were seen by the watchman, and went a little south along the east side of said tracks to a point near a scale house. They stood in front of the scale house near the tracks in plain view of the watchman and the crew of the approaching switch train and until the engine and several cars had passed, after which they ran toward and along the side of the moving train. Appellant caught hold of a rung on the side of one of the cars, swung upon the stirrup, was almost immediately struck by a dwarf signal properly located at the side of the track, was thrown from his position, under the car, sustaining injuries which required the amputation of both legs.

The plaintiff was thirteen years of age at the time of the accident, and lived with his parents, about one block from the defendant's tracks, at which place he had lived for three months before the accident, and prior to that he had lived right adjoining the St. Paul railway tracks, about eight blocks from the defendant's tracks. He was thoroughly familiar with the scene of the accident, knew the location of the tracks, and the identity of the tracks upon which trains in both directions ran. He knew the location of the dwarf switch signal which caused his fall. He knew it was quite close to the track and he knew he would have to be careful in going past the same in order to avoid being hit thereby. On previous occasions when he had passed such signals he had stood up straight next to the car upon which he was riding in order to avoid contact therewith. He knew it was dangerous to jump on moving cars and had never told his father and mother of his practice of so doing. He was at least of ordinary intelligence for a boy of his age. He was in the seventh grade at the time of the accident and always had good standings and successfully made his grade each year.

The case was tried before a jury. At the close of the testimony, upon motion of the defendant, the court directed a verdict in its favor on the ground that no negligence was shown on the part of the railroad company. From the judgment entered on such directed verdict this appeal was taken.

For the appellant there were briefs by *William L. Tibbs*, attorney, and *Daniel W. Sullivan*, of counsel, both of Milwaukee, and oral argument by *Mr. Tibbs*.

R. N. Van Doren of Milwaukee, for the respondent.

OWEN, J. The trial court directed a verdict in favor of the defendant solely upon the ground that the evidence did not disclose any violation of a duty which the defendant owed to the plaintiff and that actionable negligence on the part of the defendant had not been shown. Appellant contends that the railroad company failed in the performance of its duty in its long acquiescence in the custom obtaining on the part of both boys and men of frequenting the right of way and jumping on moving freight trains and cars at the Wilcox-street crossing without any protest against such custom on the part of the company and without any effort on its part to stop or break up such custom and practice. We shall not consider the question of the negligence of the company, for the reason that, whether or not the company was guilty of negligence, plaintiff must be held guilty of contributory negligence as a matter of law.

We are thoroughly familiar with the principle that children of tender age are not held to that degree of care ordinarily exercised by adults, and that, frequently, conduct which would convict an adult of negligence as a matter of law raises but a jury question as to a child of tender years. However, this court has held children much younger than plaintiff in this case guilty of contributory negligence upon conduct much less rash than his. It may be that this court has been too rigorous in the standard of care required

of childhood and youth. But if any respect is to be accorded such precedents as *Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770; *Wills v. Ashland L., P. & St. R. Co.* 108 Wis. 255, 84 N. W. 998, and *Ballard v. Bellevue A. Co.* 162 Wis. 105, 155 N. W. 914, the plaintiff in this case must be held guilty of contributory negligence as a matter of law.

In the *Ryan Case* a boy a little less than nine years of age, while walking in the street, was struck by a street car, unobserved by him, due entirely to his inattention. He was held guilty of contributory negligence as a matter of law. In the *Wills Case* a country boy who lacked two months of being fourteen years of age, who was but infrequently in the city, who was walking in a peculiarly confused place in the road, just emerging from the shadows of a double and complicated railroad bridge onto the street, where there was no sidewalk, and where the ordinary paved way was much used by foot passengers; and while his attention was unquestionably attracted by the novel and interesting sight of an ore train making its way over the trestle out to the ore docks, unconsciously gravitated so near to the street-car track that he was struck by a passing car, was held guilty of contributory negligence as a matter of law. In the *Ballard Case* the plaintiff, a girl eleven years of age, was injured while riding in and operating an automatic elevator in an apartment building. Because she knew and appreciated that children of her age had been prohibited by the proprietor of the building from operating the elevator, and knew that it was dangerous for her to do so, she was held guilty of contributory negligence as a matter of law.

In the *Ryan* and *Wills Cases* the negligence of the children consisted simply in a lack of attention to where they were going, and was of a negative and inactive character. The conduct which held them guilty of contributory negligence did not savor of deliberate rashness, as is the case here. The practice of jumping on moving trains is uni-

versally recognized as a hazardous and rash proceeding. Its danger to life and limb is open and notorious and was thoroughly understood by the plaintiff. He not only had arrived at the age of understanding, but had a familiarity with railroad trains and understood as well as an adult the dangers he assumed to his personal safety in attempting to jump upon and ride upon a moving freight car. To hold that he was not guilty of contributory negligence as a matter of law would be not only to entirely disregard and overrule the cases above cited, but to go much further, because the plaintiff here, in view of his age and his thorough understanding of the danger to which he subjected himself by his deliberate act, could well be held guilty of contributory negligence even though the cases above cited had been decided otherwise.

It is said by appellant's attorneys that the trial court acquitted the plaintiff of contributory negligence. We do not think so. The trial judge, in his remarks to the jury, seemed to exclude from consideration, for the purposes of the case, all questions except that of the negligence of the defendant, and directed a verdict because he could find no violation of any duty which the railroad company owed to the plaintiff. But even though he had acquitted the plaintiff of contributory negligence it could not affect our conclusion in the premises. The judgment must be affirmed.

By the Court.—Judgment affirmed.

RATHMANN, Respondent, vs. SCHWANZ, Appellant.

December 4, 1919—January 13, 1920.

Sales: Parol evidence to show who is party to contract: Undisclosed principal: Attachment: Dismissal of principal action: Appeal from judgment in original action: Civil court of Milwaukee county: Maintenance.

1. A judgment of the civil court of Milwaukee county in dismissing the principal action commenced by plaintiff to recover

damages for breach of contract included a determination of the issues in the attachment proceedings, and plaintiff's appeal from the judgment carried the attachment proceeding to the circuit court with the principal action.

2. The negotiations and conversations between the parties leading up to and including the making of a written contract are not admissible evidence to contradict and vary it, where the writing plainly purports to contain the entire contract, in the absence of accident, fraud, or mistake of fact.
3. If a writing is signed by a person who in fact acts as agent for another in executing the agreement, it may be shown by parol that it was signed for the undisclosed principal.
4. Where a contract of sale of a motor truck was signed by plaintiff as agent for a truck company, the court properly rejected an offer to show by parol that plaintiff was in fact the contracting party.
5. Where the complaint in a principal action is properly dismissed, the attachment proceedings necessarily fall with it.
6. In an action for breach of a contract to purchase a motor truck, the court properly refused to dismiss an answer and counterclaim for money paid plaintiff, although another truck company, when selling defendant a truck, "agreed to assume the responsibility should any trouble arise from the cancellation of" plaintiff's order and furnished counsel to defend plaintiff's action, there being no showing of a wrongful supporting and officious intermeddling in the suit.

APPEAL from an order of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

The appeal is from an order reversing a judgment of the civil court of Milwaukee county and directing a new trial in the circuit court.

Two trials were had in the civil court, one on the traverse in the attachment proceeding and the other of the issues raised by the complaint, answer, counterclaim, and reply thereto.

The action was brought by plaintiff for damages for alleged breach of contract. The plaintiff proceeded by both garnishment and attachment, and the issues presented by the traverse to the attachment were tried before AUGUST E. BRAUN, a judge of the civil court, on October 5, 1917. The issues arising on the trial of the principal action were tried

before JOSEPH E. CORDES, judge of the civil court, on October 26, 1917.

Plaintiff's complaint in the principal action alleges in substance the following: That on August 2, 1917, defendant entered into an agreement with plaintiff for the sale by plaintiff to defendant of a motor truck with equipment; that the purchase price was $3,450, upon which defendant was to receive credit for $700 for four horses, harnesses, and one dump wagon, which were to be turned in by the defendant on the deal; that $100 was to be deposited by defendant with the order, $300 to be paid upon delivery of the truck, and the balance to be paid in twelve equal monthly instalments; that defendant paid the $100 to plaintiff at the time the sale was made; that on August 20, 1917, plaintiff tendered delivery of the truck to defendant, which tender was rejected; that plaintiff, to the knowledge of the defendant, had already made a resale of the horses, harnesses, and dump wagon; that the defendant refused to accept the truck when tendered to him; and that by defendant's breach of contract plaintiff suffered damages in the sum of $900.

Defendant answered denying that he had entered into an agreement with plaintiff for the sale of the truck, and alleges that the agreement for the purchase of the truck was with the plaintiff as the agent of the Available Truck Company of Chicago, Illinois; that the payment of $100 was made to plaintiff, but alleges that this payment was made by defendant to plaintiff as agent of the Available Truck Company, and denies that plaintiff made a resale of the horses, harnesses, and dump wagon. He further alleges that plaintiff had no right to make such a resale; that defendant had no notice of any such resale; that plaintiff suffered no damage; and that plaintiff, subsequent to tendering him the Available truck, sold it at a greater profit than that contracted for by the alleged sale thereof to him; that the Available Truck Company is a foreign corporation and has

not complied with the statutes of this state authorizing it to do business in Wisconsin and that any contract between this defendant and the Available Truck Company is void; that one of the terms of the agreement between the parties was the delivery of the truck within ten days after August 2, 1917, and that the truck was not delivered within such time; that on August 8, 1917, before any offer of delivery of the truck was made, he canceled the order for the truck with the express consent of the plaintiff as agent of the Available Truck Company, and alleges that defendant, relying on this cancellation, entered into an agreement with a third party and bought from such third party a motor truck; that if any agreement existed between the plaintiff and defendant it is void by reason of the statute of frauds.

By way of counterclaim defendant alleges the payment of the sum of $100 to plaintiff and asks for recovery thereof.

Replying to the counterclaim of defendant, plaintiff denies that he was at any time the agent for the Available Truck Company of Chicago, Illinois, and alleges that the agreement referred to by defendant as existing between defendant and a third party is void for the reason that the agreement contained the provision that the third party, the Pauly Motor Truck Company, agrees to hold the defendant harmless from damages or costs of suit which plaintiff might bring against defendant for the breach of contract alleged in the complaint; that the Pauly Motor Truck Company has retained attorneys to appear in this action for the defendant.

Upon the trial of the traverse of the writ of attachment in civil court, the court found that no grounds existed for the issuance of an attachment as alleged by plaintiff at the time the writ was issued, and found that defendant had suffered damages to the amount of $20 by the issuance of the writ of attachment and the attachment of defendant's property, and ordered that the attachment be quashed and

the defendant recover the $20 and his costs and disbursements in the attachment proceeding.

At the close of the trial of the principal action the civil court directed a verdict dismissing the complaint of the plaintiff and awarded damages in favor of the defendant upon his counterclaim in the sum of $100, with costs and disbursements. The civil court on November 6, 1917, entered a judgment in the action awarding defendant a recovery of the $20 damages in the attachment proceeding and the $100 on his counterclaim in the original action, with $35.74 costs. From this judgment an appeal was taken to the circuit court for Milwaukee county, which court entered an order directing a new trial. This is an appeal from such order.

For the appellant there was a brief by *Hennessey & O'Boyle,* attorneys, and *Oliver L. O'Boyle,* of counsel, all of Milwaukee, and oral argument by *Oliver L. O'Boyle.*

Carl H. Juergens of Milwaukee, for the respondent.

SIEBECKER, J. The civil court's judgment in dismissing the principal action commenced by plaintiff to recover damages for breach of contract includes a determination of the issues in the attachment proceedings. Plaintiff's appeal from this judgment carried the attachment proceeding to the circuit court with the principal action.

The circuit court granted a new trial in the action upon the record on the ground that the evidence offered by the plaintiff on the trial of the issues in the principal action and on the trial of the issues presented by the special traverse in the attachment proceedings was improperly excluded.

On the trial of the principal action it appeared that the defendant and plaintiff on August 2, 1917, negotiated for a sale of an Available motor truck to defendant at a stipulated price, and fixed the terms of payment of the purchase price. The plaintiff testified that this sale was made by him personally as sole trader in the city of Milwaukee of Available

motor trucks; that he was engaged in buying these trucks from the manufacturer and selling them to customers in Milwaukee; that the sale of the truck to the defendant was a sale by him personally to defendant, and that the written memorandum of the sale in the name of the Available Motor Truck Company to defendant was intended and mutually understood, when he and defendant signed it, to be a contract of sale by him personally to defendant. The defendant testified that when he made the written contract for the purchase of the truck he made it with the plaintiff as agent of the Available Truck Company and that the writing was executed to evidence such purchase. Production of the written memorandum discloses on its face that it is in form a contract between the Available Motor Truck Company of Chicago, Illinois, and defendant, specifying the kind of truck defendant ordered, fixing the purchase price and terms of payment, and specifying certain guaranties, and is signed as follows: "Available Truck Company by *Louis Rathmann.* Approved, ——. Accepted August 2, 1917. By *H. H. Schwanz.*" At the foot of the memorandum it stated that to make the contract binding upon the seller it must be approved by the president of the Available Truck Company.

We have examined the evidence and find the trial court is well sustained in its conclusion that there is no evidence to show that there was a subsequent agreement between the parties to this action modifying the terms of this written agreement and that the record does not sustain the circuit court in its conclusion that the trial court erred in its ruling on the admission of evidence. Did the circuit court properly hold that the trial court erred in holding that the oral testimony offered by plaintiff to show that the written memorandum of sale does not embody the contract actually made by plaintiff and defendant for the sale of the truck is properly admissible in this action by plaintiff for a breach of contract for the sale of the truck? There is no dispute

that the writing was in fact executed by the parties, that it shows on its face that it is a contract between the defendant and the Available Truck Company of Chicago. It is an elementary principle of the law that the negotiations and conversations between parties leading up to and including the making of a written contract are not admissible evidence to contradict and vary it, where the writing plainly purports to contain the entire contract, in the absence of accident, fraud, or mistake of fact. 10 Ruling Case Law, p. 1016, § 208. If such a writing is signed by a person who in fact acts as agent for another in executing the agreement, it may be shown by parol that it was signed for the undisclosed principal. Such evidence is not regarded as contradicting the writing. *Stowell v. Eldred,* 39 Wis. 614. "But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done." *Weston v. McMillan,* 42 Wis. 567.

The contract before us shows on its face that the Available Truck Company of Chicago is the contracting party for the sale of the truck to defendant. The offer to show by parol that plaintiff was in fact the contracting party instead of the Available Truck Company was properly rejected by the trial court upon the ground that it would contradict the writing in question. The record sustains the trial court in holding that the Available Truck Company is the contracting party for the sale of the truck to defendant and that plaintiff has no cause of action for the breach of this contract, and that his complaint must be dismissed. Since plaintiff's complaint in the principal action must be dismissed, it necessarily follows that the attachment proceedings must fall with it, and the judgment of the civil court dismissing the principal action and attachment proceedings must be affirmed on appeal to the circuit court, unless the record shows that the civil court committed re-

versible error on the trial. The circuit court granted a new trial upon the ground that the evidence offered in the principal action to show that the contract signed by defendant for the purchase of the Available motor truck is the contract of plaintiff was competent. As above indicated, this was error. The circuit court was of the opinion that the trial court erred in rejecting the plaintiff's claim that the agreement between defendant and the Pauly Motor Truck Company for the sale of a motor truck to defendant, whereby the Pauly Motor Truck Company "agreed to assume the responsibility, should any trouble arise from the cancellation of Available truck order," showed that the Pauly Motor Truck Company was guilty of wrongfully supporting and officiously intermeddling in this suit and that defendant's counterclaim in this action should be dismissed and his answer stricken. There is nothing to show that the Pauly Company in any respect did anything to stir up strife and quarrels between plaintiff and defendant or to assist and maliciously advise or assist defendant in prosecuting his defenses or his counterclaim in this litigation. We find no basis to sustain the circuit court in its conclusion on this phase of the case. It is considered that the circuit court erred in granting a new trial of the action.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with directions to award judgment on the record affirming the judgment of the civil court.

GROSS COAL COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

December 4, 1919—January 13, 1920.

Eminent domain: Action for damages: Trespass: Failure to provide for assessment of damages: New trial: Concurring verdict of successive juries: Discretion of court.

1. Though, under sec. 12, ch. VII, of the Milwaukee city charter, made applicable by sec. 2, ch. 376, Laws 1901, relating to construction of viaducts, an appeal is provided from an assessment of damages and benefits, a landowner is not thereby deprived of an action for damages sustained by the construction of a viaduct where the city made no provision for the ascertainment of such damages and benefits.
2. While a trial court may properly, and undoubtedly should, set aside a second concurring verdict of a jury with greater reluctance than in the first instance, his discretionary power is still existent, the jury system being the common-law system and there being no statute changing such discretion.

APPEAL from an order of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

This action is brought to recover damages alleged to have been sustained by the plaintiff as the owner in fee simple of a certain piece of property in the city of *Milwaukee,* with 531 feet frontage on First avenue, by reason of the construction by defendant of a viaduct on First avenue in front of these premises.

The viaduct was constructed under the provisions of ch. 376, Laws 1901, which provided by sec. 2 thereof as follows:

"Section 2. Whenever the common council of such city shall have determined to erect and construct such a viaduct it shall cause to be made a complete profile plan and detailed specifications for the work, with an estimate of the cost thereof, and as soon thereafter as practicable the city may enter upon the construction of said viaduct, bridges, stairways and approaches in conformity thereto, and all provisions of law relative to public work or improvements in said city, which are not inconsistent with the provisions of this

act shall apply to the work hereby authorized, and all official acts incidental thereto. *If by the construction of such viaduct in the manner so provided any damages shall be sustained by the owners of abutting property, to the property owned by them, such damage shall be ascertained and determined in the manner provided by law for the determination and assessment of damages for the alteration of the grade of a street in said city and shall be paid as hereinafter provided.*"

The complaint contained the following:

"14. The plaintiff further alleges that the said city of *Milwaukee* proceeded to make the said change and alteration of said grade and to construct the said viaduct without having previously made any assessment of damages resulting to the plaintiff from said change of grade and from the construction of said viaduct, and without having made any provision for the ascertainment and payment of any damages to the plaintiff."

The answer contained the following:

"16. Further answering, the defendant admits that the construction of the viaduct along First avenue was made without having previously made any assessment of damages and without having made any provision for the ascertainment and payment of any damages to any persons owning property fronting on and along said First avenue at the place where said viaduct was erected."

In the first trial a general verdict in favor of defendant was rendered. That verdict was set aside by the late Judge TARRANT and a new trial granted, which ruling was affirmed by this court. 148 Wis. 72, 134 N. W. 139.

On the second trial the jury found by their special verdict now before us that the fair market value of plaintiff's property was not depreciated by the construction of the viaduct. The trial court denied defendant's motion for judgment upon the verdict and ordered that such answer of the jury be set aside and a new trial granted upon the ground that the said verdict is against the clear preponderance of

the evidence and the justice of the case. From such order the defendant has appealed.

For the appellant there was a brief by *Clifton Williams,* city attorney, *John M. Niven,* first assistant city attorney, and *Mark A. Kline, Chas. W. Babcock, Walter J. Mattison, Jos. L. Bednarek,* and *Raymond F. Jaekels,* assistant city attorneys; and the cause was argued orally by *Mr. Williams.*

For the respondent there was a brief by *Lenicheck, Boesel, Story & Wickhem* of Milwaukee, and oral argument by *F. J. Lenicheck* and *F. T. Boesel.*

ESCHWEILER, J. The appellant insists that the order of the circuit court should be reversed upon two grounds: (1) that no such action at law can be maintained by plaintiff and that its sole remedy is under sec. 12, ch. VII, of the charter of the city of *Milwaukee* by way of appeal from any assessment of benefits and damages; (2) that in absence of misconduct of counsel or error by the court and with a second jury arriving at the same conclusion as did a first, there no longer exists any discretionary power in the trial court to set aside such verdict or grant a new trial.

Action by the city authorities to have ascertained and determined the damages, if any, to abutting property owners by reason of the erection of such structure under ch. 376, Laws 1901, is a condition precedent to any insistence by the city that such abutting owner must resort to the exclusive remedy provided in the city charter of *Milwaukee* in the form of appeal from such an award by reason of alleged inadequate or disallowance of any damages.

Defendant admits entering upon and completing the construction of such viaduct, having had no such determination made. It having itself failed to furnish the necessary and proper foundation upon which plaintiff could sustain an appeal under the city charter, it cannot now insist that

an abutting property owner who claims damage to his property by reason of the action of the city in so constructing the viaduct must be relegated to the limbo of remediless wrongs.

On the disposition of this case on the former appeal (148 Wis. 72, 134 N. W. 139), the right of the plaintiff to recover upon the one ground of an alleged change of the established grade of First avenue was disposed of, undoubtedly because much discussed in the briefs, but the right to maintain the action against the city as a trespasser because it did the work without a precedent ascertainment and determination of possible damages was not mentioned in the opinion. Such claim, however, was in the complaint as quoted above as it stood in both trials.

That the city failing of such condition precedent gave an injured abutting property owner a cause of action in tort for his damages by reason of the trespass committed by the erection of this identical viaduct in such unlawful manner, was squarely held in the case of *Pabst B. Co. v. Milwaukee*, 148 Wis. 582, 591, 133 N. W. 1112, argued at the same time as was the former appeal herein but decided subsequent thereto.

Other cases arising out of the construction of this same viaduct, but for property on the west side thereof, were decided the same way: *Fred Miller B. Co. v. Milwaukee*, 155 Wis. 81, 143 N. W. 1066; *Bagnall v. Milwaukee*, 156 Wis. 642, 146 N. W. 791.

The same view was taken of a similar statute under which a viaduct was built by the county of Milwaukee. *Voigt v. Milwaukee Co.* 158 Wis. 666, 149 N. W. 392.

Defendant contends that seven new points or defenses appeared on this second trial that were not in the evidence on the first trial. We have considered them. They do not, in our judgment, determine this case in defendant's favor.

A carefully prepared tabulation and comparison of the testimony of the opposing witnesses as to the resultant

damages or benefits to this property on the two trials has also been presented. It demonstrates that the second jury had practically the same field of evidence as did the first in which to wander astray, assuming that the first jury erred. This court has held on the former appeal that the first trial judge did not err in holding that the first jury did.

We take the same view now, and hold that it was within the field of reasonable discretion by the trial court, upon the evidence in this case, to either uphold or set aside the verdict.

Many decisions are cited to the proposition involved in the second of the above stated questions raised by defendant. Many such may be found in 29 Cyc. 729. Some of the decisions holding to a strict limitation as to this discretionary power of a trial judge are upon statutory provisions so limiting the power. The legislature here has not made any such regulation.

We take the jury system as we received it from the common law. *Norval v. Rice,* 2 Wis. 22, 29. There it was under the superintending power of the trial court. *Capital T. Co. v. Hof,* 174 U. S. 1, 13, 19 Sup. Ct. 580; *Simmons v. Fish,* 210 Mass. 563, 565, 97 N. E. 102.

Though a trial court may properly, and undoubtedly should, set aside a second concurring verdict of a jury with greater reluctance than in the first instance, his discretionary power is still there. *Ladwig v. Supreme Assembly E. F. U.* 125 Minn. 72, 145 N. W. 798.

Though the doctrine of *stare decisis* is applicable to judicial decisions which now may be viewed as judicial errors, it does not hold as to jury errors.

By the Court.—Order affirmed.

ARTHUR KOENIG COMPANY, Respondent, vs. GRAHAM GLASS COMPANY, Appellant.

December 5, 1919—January 13, 1920.

Principal and agent: Forfeiture of compensation by agent: Appeal: Issues not submitted in special verdict: Brokers: Order to discontinue selling: Compensation on sale afterwards made.

1. An agent who is guilty of fraud upon his principal, or who betrays his trust by acting adversely to the interest of his principal, or is guilty of unfaithfulness, dishonesty, gross misconduct, gross mismanagement or unskilfulness, or who fails to follow express instructions, as a general rule forfeits his right to compensation.
2. On defendant's appeal from a judgment for plaintiff, disputed material questions of fact not submitted to the jury in special questions will be treated as having been found by the trial court against defendant, under sec. 2858*m*, Stats.
3. Where a bottle manufacturing company, with knowledge that a broker employed to procure orders had negotiations pending, telegraphed the broker to discontinue soliciting orders, without referring to pending negotiations, the broker, being a sales agent only and having no managerial responsibilities, upon consummation of the pending negotiations was entitled to compensation for procuring the orders, though the company could not fill them.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an action to recover the reasonable value of the plaintiff's services as a broker in the sale of 36,000 gross of beer bottles, it being alleged in the complaint that the reasonable value is $1,500.

The defendant denied that plaintiff had ever been employed or authorized to act as a broker or agent for it, and denied that the plaintiff was a procuring cause of the sales upon which the commissions were based. The case was submitted to the jury upon a special verdict, and the jury found (1) that R. A. Graham (one of the officers of defendant company), on September 18, 1916, promised that the defendant would pay the plaintiff one and one-half per

cent. commission on orders for bottles which the plaintiff procured for the defendant from the Pabst, Schlitz, Blatz, and Milwaukee-Waukesha brewing companies; (2) that George F. Knox (managing sales agent of defendant for Wisconsin), on October 11, 1916, agreed to give the Pabst Brewing Company an extra one per cent. discount upon its order and to have such extra discount taken out of his commission; (3), (4), and (5) that the plaintiff was a procuring cause of the sale of bottles to the Milwaukee-Waukesha Brewing Company and to the Pabst Brewing Company.

The defendant moved, after the rendition of the verdict, to have the answers to each of the questions changed, and for a new trial. The motions were denied, and the plaintiff had judgment for $1,689, from which judgment the defendant appeals.

For the appellant there were briefs by *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, and oral argument by *Geo. B. Hudnall.*

For the respondent there was a brief by *Bohmrich & Gabel* of Milwaukee, and oral argument by *Louis J. Bohmrich.*

ROSENBERRY, J. The only contention made by the defendant upon this appeal is that the plaintiff in accepting from the Pabst Brewing Company the order for 36,000 gross of bottles, after Knox, the defendant's general sales agent for Wisconsin, had been notified that the defendant's factory output was practically sold, and Knox had been directed to discontinue soliciting orders, was such gross negligence and gross misconduct as to preclude the plaintiff from recovering any commission upon such sale.

There is no dispute as to the rules of law applicable. An agent who is guilty of fraud upon his principal or who betrays his trust by acting adversely to the interest of his principal, or is guilty of unfaithfulness, dishonesty, gross misconduct, gross mismanagement, gross unskilfulness, or who

fails to follow his principal's instructions, as a general rule forfeits his right to compensation. *Rogers v. Priest,* 74 Wis. 538, 43 N. W. 510; 2 Corp. Jur. 760, 766; *St. Paul F. & M. Ins. Co. v. Laubenstein,* 162 Wis. 165, 155 N. W. 918.

The controversy in this case centers upon an order taken by the plaintiff from the Pabst Brewing Company on October 11, 1916. Treating the findings of the jury as verities, and they are not attacked, treating other disputed material questions of fact not submitted as found against the defendant, under the provisions of sec. 2858*m,* Stats., substantially the following situation is presented: George S. Knox of Milwaukee was the general sales agent of the defendant company for the states of Wisconsin and Minnesota. He entered the employment of the defendant company in February, 1915, and had a contract with it to sell its bottles exclusively at prices to be furnished by the defendant. He was to receive as compensation three per cent. of the sales price, after deduction of freight. In the years 1915 and 1916 Mr. Knox had desk room in the office of the plaintiff company, which was a broker and dealer in brewers' supplies. The relations between Knox and Koenig, managing officer of the plaintiff company, became friendly, and in the early part of the year 1915 an arrangement for splitting commissions was made on all orders for bottles which Koenig might obtain. On September 18, 1916, R. A. Graham, vice-president and general sales manager of the defendant company, came to Milwaukee, and the three went to the office of the Pabst Brewing Company, and the jury found that at that time Mr. Graham took from Mr. Knox the sales to the four brewing companies mentioned, placed them in the hands of Koenig, and promised Koenig that he would pay him one half of the commissions which Mr. Knox was to receive under the contract for these sales, to which Mr. Knox consented. On this visit a trial order for two carloads of bottles was secured, which

were afterwards shipped and found satisfactory. On September 28, 1916, plaintiff wrote the defendant company that it could secure an order from the Schlitz Brewing Company for from 30,000 to 40,000 gross at a price of $2.45 per gross, sixty days, or two per cent. cash in ten days. The defendant replied that it could not make a price lower than $2.60, but that if it was a question of losing the order they would permit the giving of an extra one per cent. if Mr. Knox would consent to have it taken off his commission, but said nothing indicating that its output was sold up. The plaintiff wrote the defendant, urging it to meet the competition and make a better price. On October 9th Mr. Knox was in St. Paul, and while there received a telegram from the defendant as follows: "Return to Milwaukee and discontinue traveling and soliciting orders. Factory is practically sold up."

Mr. Knox arrived in Milwaukee on the morning of October 10th. There was some discussion between Knox and Koenig as to whether or not this telegram affected pending negotiations, and it was Knox's opinion that it did not. On the 11th the plaintiff took the order from the Pabst Brewing Company for 36,000 gross of bottles and wired the defendant accordingly. The defendant answered:

"Do not accept order from Pabst as we are practically sold up. We may be able to accept 10,000 gross from them at regular price and will notify you last of week."

The plaintiff replied:

"Your wire eleventh we must positively insist upon acceptance of Pabst order your Mr. R. A. Graham knows that negotiations were pending and we cannot afford to waste our time for nothing leaving for St. Paul tonight will return Saturday morning and expect positively your confirmation."

On October 17th the defendant replied by telegram as follows:

"Your wire we cannot accept any orders we were unable

to arrange with any other factory to make bottles for us positively cannot make the Pabst order you must realize that we cannot accomplish the impossible."

The original order which the plaintiff received from the Pabst Brewing Company was not forwarded to the defendant, but the plaintiff made out upon its own order blank what purported to be a duplicate of the Pabst Company's order and forwarded it to the defendant. It is now claimed that the order sent by the plaintiff to the defendant was materially different from the order taken by the plaintiff from the Pabst Brewing Company. Nothing appears to have been made of this upon the trial. The evidence in regard to it is very meager. No request was made by the defendant for a special finding in this respect. Whether or not the order transmitted was materially different was a question of fact and should have been determined as such upon the trial, and in view of the fact that the order was refused upon other grounds before the alleged duplicate was received, no complaint ever appearing to have been made upon that ground, we must hold that defendant's contentions in that respect are not sustained.

Mr. Graham came to Milwaukee for the express purpose of procuring the business of the four larger breweries; defendant knew that subsequently thereto negotiations were pending between the plaintiff and the breweries; defendant knew the trial order had met with approval; defendant failed to notify the plaintiff of its changed situation—there was nothing said in relation to the Milwaukee business in the telegram sent to Knox. Knox, the managing agent, thought that the order contained in the telegram did not apply to the Milwaukee business. In view of these facts. the plaintiff being a mere sales agent and having no managerial duties or responsibilities, we cannot say upon the record that the plaintiff was guilty of such gross misconduct as to forfeit its right to the agreed commission.

By the Court.—Judgment affirmed.

DEFIANCE MACHINE WORKS, Respondent, vs. GILL, Appellant. [Two appeals.]

December 5, 1919—January 13, 1920.

Sales: Nature of conditional sale agreement: Actions by vendor: Recovery of purchase price: Waiver of right to retake goods: Principal and surety: Discharge of surety by release of security: Pleading: Evidence: Presumption of similarity of laws of sister state: Subrogation: Nature and enforcement: Parties: Civil court of Milwaukee county: Power of circuit court to direct new trial: Supreme court: Inability to confer authority on inferior courts.

1. The vendor of goods upon a contract of conditional sale does not waive the right to retake the goods by attempting to enforce collection of the purchase price. This principle is now embodied in the statute law of the state by sec. 1684*u*—24, Stats. 1919 (ch. 672, Laws 1919).
2. It must be presumed that the law of a sister state as to the rights of a seller against a buyer under a conditional sale contract and an indorser of the buyer's notes is the same as that of this state, in the absence of allegations and proof to the contrary.
3. A surety paying the debt of his principal is subrogated to the security held by the creditor, and the latter's voluntary surrender of the same to the debtor discharges the surety *pro tanto.*
4. In an action by the secured holder of a note against the indorser, plaintiff need not allege that the security is still in his hands and that he is ready and able to surrender the same to the indorser on payment of the note.
5. Subrogation is an equitable right in favor of a surety which does not arise until payment has been made; and a surety may waive his right to subrogation.
6. The right of subrogation presents a justiciable issue which should be made up and brought to the court's attention by a proper and orderly pleading by the surety upon the buyer's conditional sale note; but where the pleadings tendered no such issue, it may not be implied from the mere recital in the notes that title was retained by the seller until payment, and the matter may not be determined where all necessary parties are not before the court. [Whether an indorser of a conditional sale note, upon paying the obligation, succeeds to the rights of the vendor under the contract of sale, not decided.]

7. A conditional sale, as shown by reservation of title in the sale notes, is not a pledge or lien in the nature of a chattel mortgage, but is an executory sale contract vesting the right of possession in the purchaser, while the title remains in the seller until the imposed conditions are met by the purchaser, when title *ipso facto* passes to him by virtue of the original agreement.
8. The circuit court for Milwaukee county has no authority to order the civil court of Milwaukee county to grant a new trial, since the power of the circuit court is limited to affirmance, modification and affirmance, or reversal and new trial in the circuit court, under sec. 28, ch. 549, Laws 1909. Its most liberal power to grant a new trial is conferred by sec. 2879, Stats., and is limited to motions made within one year from the verdict or findings, and does not apply to a motion made almost two years thereafter.
9. Sec. 2405*m*, Stats. (authorizing the supreme court, where the record shows that the real controversy has not been fully tried, or where justice has probably miscarried, to reverse, regardless of whether proper motions, objections, or exceptions appear of record, and remand the case for a new trial, directing entry of the proper judgment), does not give this court power to reverse a judgment of the circuit court and direct it to remand the case to the civil court of Milwaukee county with instructions to grant a new trial, since this court may not confer power upon inferior courts, their powers being derived from the constitution and statutes.

APPEALS from a judgment and an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was begun in the civil court of Milwaukee county against the defendant as indorser of four certain promissory notes, all dated March 14, 1914, each for the sum of $427.50, executed by the Mobile Hoe Company to plaintiff. At the foot of the usual promise to pay found in ordinary promissory notes occurs this recital:

"The express condition of the sale and purchase of said machinery as specified in contract is such that the title and ownership of said machinery does not pass from said *The Defiance Machine Works* until this note and interest, and all other notes and interest given in pursuance of such sale and purchase, are paid in full. And it is further agreed

that the above property shall not be attached to, so as to become a part of, any real estate, but shall remain personal property until paid for."

The answer of the defendant admits the execution of the notes by the Mobile Hoe Company, admits that the defendant indorsed said notes, admits their maturity as alleged in the complaint, denies any knowledge or information sufficient to form a belief as to whether plaintiff is still the lawful owner and holder thereof, and denies each and every other allegation of the complaint.

At the trial the notes were introduced in evidence and testimony given to the effect that no part of the principal or interest thereof has been paid. The defendant objected to the receipt of the notes in evidence because "incompetent, irrelevant, and immaterial, and, particularly, as it appears upon the face of these notes that they are conditional bills of sale, and the plaintiff has surrendered its right to make claim to the defendant by reason of losing its security before the commencement of this action." Judgment was rendered by the civil court against the defendant for the full amount of the notes on March 17, 1917. Defendant appealed to the circuit court. While the case was pending in the circuit court, to wit, January 17, 1919, and before decision thereon, defendant served upon plaintiff's attorneys notice of a motion that, in the event the circuit court shall deny the defendant's motion for a reversal of the judgment of the civil court, then the defendant will request said court to order that the civil court of Milwaukee county shall grant a new trial in said action, upon such terms as may seem just to said civil court, to permit said defendant to offer proof that the plaintiff has parted with its right, title, and interest to the machinery for which the notes were given and thereby prevented the defendant from being subrogated to the rights of plaintiff by reason of the conditional bill of sale referred to in the complaint. Said motion was based upon the affidavit of defendant's attorney, in

which it was stated, upon information and belief, that since the rendition of the judgment in this action, by virtue of an execution against the goods and chattels of the Mobile Hoe Company, the sheriff of Mobile county, Alabama, had seized and sold the machinery the purchase price for which the notes in this action were given. Affiant further says in the affidavit, upon information and belief, that at the time of the purchase of the machinery by the Mobile Hoe Company from the *Defiance Machine Works* there was executed by and between the Mobile Hoe Company and the *Defiance Machine Works* a conditional bill of sale by the terms and conditions of which the title remained in the said *Defiance Machine Works,* and which was the situation when the defendant herein indorsed the notes referred to in this action; that by reason of the seizure and sale upon the said execution by the sheriff of Mobile county, Alabama, the *Defiance Machine Works* has been for all time prevented from transferring the title and possession of the machinery referred to in this action to the defendant, *Thomas H. Gill,* as a condition of the payment of the judgment by the said *Gill.* This motion was considered by the circuit court with the merits of the case. The circuit court affirmed the judgment of the civil court and denied this motion. Separate appeals were taken from the judgment of the circuit court affirming the judgment of the civil court and from the order denying the motion for a new trial.

Arthur R. Barry of Milwaukee, for the appellant.

Joseph B. Doe of Milwaukee, for the respondent.

OWEN, J. The defendant's first position, as we understand it, is this: It appears upon the face of the notes that they were given by the Mobile Hoe Company as a part of the purchase price for certain machinery sold by the plaintiff to it, the title to which was reserved in the plaintiff until the full amount of the notes should be paid; the defendant, being the indorser of the notes, is entitled to be subrogated

to all security which the plaintiff had; that by bringing this action plaintiff has placed it beyond its power to deliver the security which it had, to wit, the contract of conditional sale, because the commencement of this action constituted an election on the part of the plaintiff to treat the conditional sale as an absolute one, and amounted to a waiver of the security which it had in and by virtue of the contract of conditional sale. We pause here simply to refer to the fact that this defense was not pleaded by the defendant in his answer, lest an inference may be drawn from our silence upon the subject that the pleadings as framed present the defense urged by the defendant. However, we will not consider the question of pleading, but pass directly to the merits of the defendant's claim.

An analysis of his position amounts to this: he admits that he indorsed the notes, but claims that the institution of a suit against him to enforce his liability as an indorser releases him. That is the sum and substance of his claim, his contention being that a vendor of goods, upon a contract of a conditional sale, must elect whether he will retake the goods or sue for the purchase price, and that when he resorts to one of these remedies he waives his right to resort to the other; in this case the plaintiff, having brought an action to recover against the indorser of the note, waived all security which the contract of conditional sale afforded him, and that by such waiver the indorser is released, because he cannot be subrogated to the security which was in the hands of the creditor. This argument leads to an absurdity which scarcely calls for elucidation, and makes the undertaking of an indorser under such circumstances a rather innocuous formality. We think a court should hesitate in adopting a course of reasoning which leads to such a farcical conclusion. However, we do not deem it necessary to pursue the subject further, because of the faulty premise upon which the conclusion must rest, and that is, that a vendor of goods upon a contract of conditional sale waives

the right to retake the goods in an attempt to enforce collection of the purchase price. This is not the law of this state. It was held in *Wiedenbeck-Dobelin Co. v. Anderson,* 168 Wis. 212, 169 N. W. 615, that the two remedies were not inconsistent, and that by pursuing one the vendor did not waive his right to the other. This principle is now embodied in statute law by the provisions of the uniform conditional sales act, sec. 1684*u*—24, Stats. (ch. 672, Laws 1919). Whether the law of this state is controlling as to the rights of the parties to these notes, we must presume that the law of whatever state is controlling is the same as ours, in the absence of allegation and proof to the contrary. It will thus be seen that the defendant's claim that the commencement of this action constituted a waiver of plaintiff's right to retake the machinery sold to the principal debtor, Mobile Hoe Company, is not well founded, and that no basis exists for the conclusion for which he contends.

It is defendant's second contention that it was incumbent upon the plaintiff to plead in its complaint its ability and readiness to turn its security over to the defendant upon the payment of the notes in question. In other words, that its ability and readiness in that behalf was a condition precedent to its maintenance of this action, and that, not having pleaded in this respect, the complaint fails to state a cause of action, and that the judgment finds no support in the record. The law unquestionably is that a surety who pays the debt of his principal is entitled to be subrogated to the security held by the creditor against the principal debtor. *Plankinton v. Gorman,* 93 Wis. 560, 67 N. W. 1128; *Lowe v. Reddan,* 123 Wis. 90, 100 N. W. 1038; *State Bank v. Michel,* 152 Wis. 88, 139 N. W. 748, 1131. It is also the law that the voluntary surrender on the part of the creditor of security which he holds against the principal debtor discharges the surety *pro tanto. Ibid.* But in order to state a cause of action against the surety it is not necessary to allege that the security originally taken is still

retained by him and that he is ready, able, and willing to transfer such security to the indorser upon the payment by the surety of the amount of the indebtedness. In other words, it is not necessary for him to make a tender of the security in court in order to entitle him to maintain an action and recover judgment against the surety. Subrogation is an equitable right in favor of the surety which does not arise until payment has been made. One of the very first essentials to the enforcement of the right of subrogation is proof of the payment of the debt. Until that is done the right of subrogation is a mere inchoate right and cannot be enforced. Furthermore, it is a right which may be, and often is, waived and not insisted upon by the surety. An action to enforce the right of subrogation is a well known equitable action. It contemplates a bill or complaint in which the facts entitling plaintiff to subrogation are set forth, and the making up of an issue, either of law or of fact, the same as in other actions.

In *Knoblauch v. Foglesong,* 37 Minn. 320, 33 N. W. 865, in an action upon a promissory note, where the answer admitted the note and alleged that the note was secured by a mortgage executed to plaintiff by defendants upon real estate belonging to them, and that after the execution of the note and mortgage they conveyed the real estate to another, who, in consideration thereof and as a part payment of the purchase price, thereupon assumed the payment of the note and agreed to pay and discharge the same; and the answer alleged defendants' willingness to pay, and offer to pay, the note upon the assignment by plaintiff to them of the mortgage and the indorsement and delivery to them of the note, and demanded that plaintiff have no judgment until he shall have deposited in the court, to be delivered to defendants upon payment by them of the judgment, the mortgage duly assigned to them, and the note duly indorsed to them, it was held that the judgment might properly so provide. But it was held to the contrary in *Barton v. Moore,* 45 Minn. 98,

47 N. W. 460, in the absence of all allegations in the answer showing defendants to be entitled to subrogation and a prayer for such relief. While we do not find any other authority holding to the doctrine of *Knoblauch v. Foglesong, supra,* we may say, in passing, that it seems to us to be proper and appropriate practice and in the interest of speedy termination of litigation and the disposition of all rights in a single action. The right of subrogation presents a justiciable issue which should be made up and brought to the attention of the court by proper and orderly pleading. In no other way can the court know that the surety insists upon the right. More than this, all parties interested should be before the court, and if there are other parties to the security claimed by the surety, especially if their interests would be prejudicially affected by transference thereof to the surety, they should be given an opportunity to be heard. 37 Cyc. 388. In the present case the pleadings tendered no issue whatever as to the right of the defendant to be subrogated to the rights of the vendor under the contract of conditional sale. He has seen fit to rest upon an answer which practically amounts to a general denial. He has set forth no facts entitling him to subrogation and has done nothing to raise the issue or to bring it to the attention of the court. The information concerning this security, if such it may be called, disclosed by the record is exceedingly meager. That it exists at all is to be implied only from the recital in the notes, and we are wholly uninformed concerning the nature of its provisions. It may be seriously questioned whether a contract of conditional sale is security to which an indorser such as the defendant is entitled upon payment of the note. That it is not a pledge or lien in the nature of a chattel mortgage is well settled. *W. W. Kimball Co. v. Mellon,* 80 Wis. 133, 48 N. W. 1100; *Winton M. C. Co. v. Broadway A. Co.* 65 Wash. 650, 118 Pac. 817, 37 L. R. A. N. S. 71; *Harkness v. Russell,* 118 U. S. 663, 7 Sup. Ct. 51. It is an executory contract of sale, by the

terms of which the right of possession vests in the vendee but the title remains in the vendor until the fulfilment of conditions imposed upon the vendee (generally the payment of the purchase price), when the title *ipso facto* passes to the vendee by virtue of the original agreement, performance of which on the part of the vendee the surety has guaranteed. We do not think it entirely clear that when the contract itself, performance of which on the part of the vendee has been guaranteed by the surety, provides that upon payment of the purchase price, for instance, title shall immediately vest in the vendee, the surety can succeed to the rights of the vendor under the contract. Is not the surety, by reason of his relation with the contract, which provides that upon payment of the purchase price the title shall pass to the vendee, estopped from claiming otherwise? No doubt persuasive arguments may be made upon either side of the question. Its decision will not here be attempted. At any rate, whether the surety is entitled to subrogation under such circumstances is certainly a matter of considerable importance to the principal debtor, who should be given an opportunity to be heard, and he is not a party to this litigation. It seems clear that the question of the defendant's right to succeed to the interests of the plaintiff under the contract of conditional sale has not been raised in this case, and the defendant is in no position to urge error on the part of the trial court for its failure to render the conditional judgment for which appellant contends.

As above stated, defendant has also appealed from the order of the circuit court denying his motion that the civil court of Milwaukee county be ordered to grant a new trial in said action. Clearly the motion was properly denied. The circuit court for Milwaukee county is vested with no authority to make such an order. The power of the circuit court in the premises was to affirm, or modify and affirm, the judgment of the civil court, unless by reason of manifest prejudicial error in the trial of the action in which such

judgment was rendered any party thereto has not had a fair trial thereof in the civil court, in which case the judgment should be reversed and a new trial had in the circuit court. Sec. 28, ch. 549, Laws 1909.

The most liberal power possessed by trial courts to grant a new trial is that conferred by the provisions of sec. 2879, Stats., to grant a new trial upon newly discovered evidence when a motion therefor is made within one year from the verdict or findings. This motion was not made until nearly two years had expired after the date of the findings. Neither was it made in the court that tried the case. We know of no statutory provision that can be stretched into anything like a sanction of such procedure.

It is urged that under the provisions of sec. 2405*m*, Stats., this court has power to reverse the judgment and remand the case with instructions to grant the motion. That section authorizes this court, where it appears from the record that the real controversy has not been fully tried, or it is probable that justice has for any reason miscarried, to reverse the judgment or order appealed from regardless of the question whether proper motions or objections or exceptions appear in the record or not, and in case of a reversal direct the entry of the proper judgment, or remand the case to the trial court for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court *not inconsistent with the statutes governing legal procedure* as shall be deemed necessary to accomplish the ends of justice. It would be a perversion of the purpose of that statute and a clear abuse of the power granted this court to give it the construction urged. This court has no power to confer power upon inferior courts. Their power must be derived from the constitution and the statutes. True, sec. 2405*m* confers upon this court broad discretion in the matter of making disposition of cases pending before it, but that section does not authorize this court to vest inferior courts with additional powers, nor can

this court authorize or compel inferior courts to exercise jurisdiction outside of the powers conferred upon them. This motion not having been made in the proper court, nor within the time required by statute, was properly denied. It follows that the judgment and order appealed from must be affirmed.

By the Court.—Judgment and order affirmed.

STEINKRAUSE, Respondent, vs. ECKSTEIN, Appellant.

December 5, 1919—January 13, 1920.

Automobiles: Contributory negligence of driver imputed to occupant: Highways: Law of the road: Violation of statute.

1. One riding in an automobile is barred from recovering for injuries caused by the negligence of a third person if the driver of the automobile is also chargeable with negligence proximately contributing to the accident.
2. The violation of secs. 1636—49, 1636—52*m*, and 1636—54, Stats., prohibiting any person from driving an automobile on the highway while intoxicated, without the owner's consent, or with the muffler open, is negligence *per se*, but not actionable negligence, unless some causal connection between such violation and the accident appears.
3. In an action for injuries sustained in a collision between two automobiles on a highway, whether the driver of the automobile in which plaintiff was riding was intoxicated, and whether such condition was a proximate cause of the accident, were questions for the jury.
4. A driver of an automobile on a highway is not "intoxicated" within sec. 1636—54, Stats., unless his indulgence in intoxicating liquors is such as to result in an appreciable interference with the exercise of ordinary care in the management of the vehicle.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The plaintiff, one of a party of three young women and three young men, while riding in an automobile south on Twelfth street and at about the center of its intersection

with Wells street in the city of Milwaukee, was injured by reason of a collision between that automobile and one driven by defendant's servant coming west on Wells street.

The automobile in which plaintiff was riding was owned by a copartnership, one member of which was the father of its driver, and it was used on this occasion without the permission of the owners. The party had driven out west of the city of Milwaukee during the evening, visiting several road houses or saloons, one of such being described as "The Bungalow," and were returning home late at night.

Defendant contends that the driver of the automobile in which plaintiff was riding was intoxicated at the time of the accident. The only evidence on that point was elicited from the driver himself, who testified substantially as follows:

"I had a few drinks there [The Bungalow], but do not remember what I drank, nor how many drinks I had. When we left the Bungalow I was not intoxicated. . . . I was so excited and at the time of the collision was slightly intoxicated; I had a few drinks, as I said. . . . At the Bungalow I did not feel what I had been drinking, but we went to the other place. I do not remember what I had to drink. Then we went to the Half-way House on the Blue Mound road, stopped there and had some more drinks. I could not say how many I had there. I did not have too many, but I had enough. I had just about enough. By the time I got down town I felt slightly what I had been drinking. It is true that I was slightly intoxicated."

There was evidence to the effect that the muffler was open on this automobile at the time of the collision and evidence to the contrary. There was evidence tending to show actionable negligence by defendant's driver.

At the close of the testimony in the civil court defendant's motion for a directed verdict in his favor was granted and judgment entered thereupon. From such judgment the plaintiff appealed to the circuit court and was granted a new trial of said cause in said circuit court. From such order the defendant has appealed.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, and oral argument by *Emmet Horan, Jr.,* all of Milwaukee.

George A. Bowman of Milwaukee, for the respondent.

ESCHWEILER, J. The appealing defendant insists that the circuit court was wrong in granting a new trial and the civil court right in granting judgment of dismissal upon the theory that negligence of the driver of the automobile in which plaintiff was riding is imputed to the plaintiff and that she cannot recover because there was such contributory negligence as a matter of law on the part of the driver as made an absolute defense. Also that such contributory negligence by the driver arose by reason of his violating, at the time of the injury, one or more of the three following statutory provisions:

Sec. 1636—54, Stats., punishing by fine or imprisonment, or both, any person who shall operate or drive any automobile upon or along any public highway of this state while intoxicated.

Sec. 1636—52*m*, providing in substance that the use or operation of an automobile upon a public highway without the consent of the owner of such vehicle is an offense punishable by imprisonment or fine, or both.

Sec. 1636—49, making it unlawful for any person to operate an automobile with its muffler open upon or along any public streets within the corporate limits of any city, and punishing the violation thereof by a fine.

It is the accepted law in this jurisdiction that any occupant of a private vehicle such as the automobile in this case is barred from recovering from a third person for injuries caused by such person's negligence if the driver of such vehicle is also properly chargeable with negligence proximately contributing to the accident. *Kadolph v. Herman,* 166 Wis. 577, 580, 166 N. W. 433; *Lauson v. Fond du Lac,* 141 Wis. 57, 58, 123 N. W. 629.

It is a well established rule that while a violation of such statutory regulations as are relied upon by defendant here is negligence *per se,* yet where such negligence is relied upon either as ground of recovery for an injury or as the defense in such an action of contributory negligence, there still must appear some causal connection between any such violation and the accident. In some situations the causal connection may be so clear upon undisputed facts as to make the determination thereof a question of law. In other situations it becomes a question of fact for the jury.

This has been so declared in a number of cases involving the law of the road, as in *Kadolph v. Herman,* 166 Wis. 577, 580, 166 N. W. 433, and *Riggles v. Priest,* 163 Wis. 199, 203, 157 N. W. 755, involving sec. 1636—49*a,* Stats., prohibiting the passing within three feet of another vehicle at a greater rate of speed than ten miles an hour; *Derr v. C., M. & St. P. R. Co.* 163 Wis. 234, 240, 157 N. W. 753, involving sec. 1636—47, by the driving of an unregistered car for which no license had been obtained; *Maher v. Lochen,* 166 Wis. 152, 155, 164 N. W. 847, where plaintiff's driver turned to the left instead of the right as provided in sec. 1636—49*b.* The same rule is held as to violation of sec. 1809, regulating the rate of speed of railroads, in *Ellis v. C. & N. W. R. Co.* 167 Wis. 392, 402, 167 N. W. 1048.

There is nothing to the contrary in the two cases relied upon by appellant of *Pizzo v. Wiemann,* 149 Wis. 235, 134 N. W. 899, involving the statute prohibiting the sale of toy pistols; or *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84, involving the employment of minors in prohibited occupations (sec. 1728*a*).

In the *Pizzo Case* it is said, referring to the wholesale dealers who sold to the retail dealers, also defendants, "The original sale was the initiating cause to which all others tied naturally in proximate relation" (p. 239). The *Pinoza Case* decided only that contributory negligence cannot be

interposed as a defense by one who is sued for injuries caused by his actual or constructive intent to violate such a law as sec. 1728*a*, designed to protect persons against bodily injuries. Page 481.

The same rule has been held in similar cases to that here presented in *Allen v. Pearson,* 89 Conn. 401, 94 Atl. 277; *Farrington v. Cheponis,* 84 Conn. 1, 8, 78 Atl. 652.

Under this view there is nothing in this record which would support findings, if any such were made, that either the driving of the automobile without the consent of the owners or with the muffler open could be held to have any causal connection with this particular accident, and they are therefore dismissed from this case.

Independently of the separate and independent question as to whether there was a want of ordinary care on the part of the driver of the automobile in which plaintiff was seated which may have proximately contributed to the accident, there are two questions involved which might be properly submitted to a jury. First, Was the condition of the driver at the time of the accident such as to meet the meaning of the word "intoxicated" as it appears in the section in question? and secondly, If such condition did exist, was such condition a proximate cause of the accident?

On the first question no precise definition of what is intoxication is made by the statute, nor will we undertake in that behalf to do more than say that it is evidently intended that the fact must appear that the driver's indulgence in the use of intoxicating liquors was such as to result in an appreciable interference with the exercise by him of ordinary care in the management of such vehicle.

In *Briffitt v. State,* 58 Wis. 39, 43, 16 N. W. 39, this court declared that judicial knowledge would be taken of such a matter of common knowledge as that beer and other alcoholic liquors are intoxicating.

It also follows as a corollary that the consumption of sufficient quantities thereof will produce intoxication. But

in the quantitative analysis that must be made in cases like the present there are always two elements: the constant or intoxicant and the ever-variable, that is, the capacity and resisting power of the individual who imbibes. Of the constant we are bound to know, but of the variable, judicial knowledge, which at the best must be assumed to be purely academic on such a subject, cannot be charged upon the court as a matter of law.

Therefore both of the questions suggested above as necessary for determination under the statute and upon the record herein are for the jury, and the circuit court was right in so holding.

By the Court.—Order affirmed.

MILWAUKEE CORRUGATING COMPANY, Respondent, vs. FLAGGE and others, Appellants.

December 5, 1919—January 13, 1920.

Appeal: Order refusing to suppress an adverse examination: Special proceeding: Continuing a provisional remedy.

1. An order refusing to suppress or prohibit an adverse examination under sec. 4096, Stats., is not appealable as a final order affecting a substantial right made in a special proceeding, under sub. (2), sec. 3069, since an adverse examination is not a "special proceeding." *Phipps v. Wis. Cent. R. Co.* 130 Wis. 279, and *Karel v. Conlan*, 155 Wis. 221, overruled.
2. Nor is such an order appealable as one continuing a provisional remedy under sub. (3), sec. 3069, since such an order does not "continue" the remedy by mere refusal to interfere with it.

ESCHWEILER, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Dismissed.*

The appeal is from an order denying a motion to suppress an adverse examination of defendant *Flagge* under sec. 4096, Stats. The plaintiff brought action against *Flagge*, the *Northern Corrugating Company*, and three other de-

fendants by the service of a summons alone. It then filed an affidavit for the purpose of obtaining an adverse examination of the defendant *Flagge* in order to enable it to plead, and, in the affidavit, alleged that the general nature and object of the action "is one brought by the plaintiff against the defendants to recover damages for an alleged conspiracy of the defendants to injure the plaintiff by wrongful acts, and damages for the alleged breach of a contract between the plaintiff and the defendant *Flagge,* and for such other and further relief as may be just and agreeable to equity." The motion to suppress was upon the ground that the plaintiff's affidavit was insufficient in that it did not state the facts showing the general nature and object of the action. Upon the hearing of the motion to suppress, additional affidavits were filed on each side, and it appeared that the defendant *Flagge* was employed by the plaintiff as its superintendent under a written contract dated November 16, 1917, and quit such employ and went into the service of the defendant the *Northern Corrugating Company* about October 1, 1918, and that the two concerns were rivals in business. The plaintiff claimed on the hearing of the motion to suppress that the said contract bound the defendant *Flagge* to work for the plaintiff and devote his time and inventive ability to its service for three years, but the defendants claimed that the contract was terminable at will. The court denied the motion to suppress, and the defendants appeal.

For the appellants there were briefs by *Minahan & Minahan* of Green Bay, and oral argument by *Eben R. Minahan.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *R. T. Jackson.*

WINSLOW, C. J. A motion to dismiss is made on the ground that the order in question is not appealable, and this must be first examined.

If appealable, it must be because it is either "a final order

affecting a substantial right made in special proceedings," or an order granting or continuing a provisional remedy. Sub. (2), (3), sec. 3069, Stats.

Examination of the question convinces us that our decisions are in serious confusion upon it. Twice at least it has been said that an adverse examination under sec. 4096 is both a provisional remedy and a special proceeding. *Phipps v. Wis. Cent. R. Co.* 130 Wis. 279, 110 N. W. 207; *Karel v. Conlan,* 155 Wis. 221, 144 N. W. 266. We are now satisfied that this holding is illogical and erroneous and should be disavowed. The Code (sec. 2594, Stats.) divides all remedies into (1) actions and (2) special proceedings. An action is distinguished from a special proceeding and *vice versa.* The term "special proceedings" includes only remedies not furnished by actions. Adverse examination under sec. 4096 is a mere proceeding within an action, an incidental part of an action. It cannot be a special proceeding because the two terms, "action" and "special proceeding," are used in the Code in contradistinction to each other. *In re Central Irr. Dist.* 117 Cal. 382, 49 Pac. 354; *State ex rel. Heinze v. District Court,* 28 Mont. 227, 72 Pac. 613.

Being a provisional remedy and not a special proceeding, the next question arising is whether an order refusing to suppress or prohibit the examination "continues" a provisional remedy. Here, also, there is evident confusion in our decisions. In *State ex rel. Carpenter v. Mathys,* 115 Wis. 31, 91 N. W. 114, it is held without discussion that an order denying a motion to limit the subjects of examination under sec. 4096 is not appealable because it neither "grants, refuses, continues, or modifies" a provisional remedy; on the other hand, it was held in *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456, that an order requiring a witness to submit to examination under sec. 4096, and an order refusing to restrain a party from taking depositions of witnesses under that section, were both appealable because they "continue" a provisional remedy. This decision was fol-

lowed *sub silentio* in *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900, and *Hathaway v. Bruggink,* 168 Wis. 390, 170 N. W. 244, in both of which cases appeals from orders refusing to suppress or restrain the taking of depositions under sec. 4096 were entertained and decided upon the merits, no question being raised as to appealability of the orders. So, also, in *Gratz v. Parker,* 137 Wis. 104, 118 N. W. 637, an appeal from an order requiring a defendant to submit to an examination was entertained and decided on the merits without discussion of the question of appealability. Appeals from similar orders were entertained and decided upon the merits in *American F. P. Co. v. American M. Co.* 151 Wis. 385, 138 N. W. 1123, and *Sullivan v. Ashland L., P. & St. R. Co.* 152 Wis. 574, 140 N. W. 316, nothing being said on the subject of appealability. The only theory upon which such orders as the present can be held appealable is the theory that they *continue* a provisional remedy, as stated in the *Phipps Case.* That theory is now for the first time sharply challenged and we have given the subject careful study, the result of which is that we are quite convinced that no such theory can be logically sustained. The right of examination under sec. 4096 is a right given by statute as a matter of course upon the filing of the required affidavit and is not dependent upon any action of the court. In refusing to interfere with the right the court does not affect the statutory right in any way; it simply lets it alone. It is an entire misnomer to speak of such action as continuing anything, thus transforming a refusal to act into an affirmative action.

The early case of *Howell v. Kingsbury,* 15 Wis. 272, is cited in the *Phipps Case* as authority for the doctrine of appealability. That case was an appeal from an order refusing to dismiss a writ of attachment, and it was held that such an order "continued" the attachment within the meaning of the appeal statute. It is to be noted that the two remedies are different, in that examination under sec. 4096

is a right given by statute without court action, while attachment is a remedy given by a writ issued out of court. Whether or not this difference be sufficient to distinguish the two cases, we feel obliged to hold that the statutory remedy of adverse examination is not continued by a mere refusal to interfere with it.

It is suggested that if it be held that no appeal lies from such an order there will be opportunity for serious abuses, in that inquiry may be made into the affairs of a business rival for illegitimate purposes, thus seriously invading privacy and property rights. The answer is that every delegation of power to an official carries with it possibility of abuse; nevertheless power must be vested somewhere if government is to be carried on. The judges of the trial courts are chosen for the very purpose of exercising the power necessary to be exercised in the administration of the law in the courts. Presumably that power will be wisely and justly exercised. If appeals were allowed from every important ruling there would never be an end of litigation. We are satisfied that our present ruling is not merely logical, but will tend to the simplification of procedure and the speedy attainment of justice in the courts.

By the Court.—Appeal dismissed.

ESCHWEILER, J. (*dissenting*). The order appealed from in this case was one permitting respondent to continue a provisional remedy theretofore commenced by it.

This appeal statute was under consideration in *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456, in 1907, and precisely the same question as here involved was held properly appealed. Page 155. That decision was based upon *Howell v. Kingsbury,* 15 Wis. 272, decided in 1862, the statute then reading exactly as now. Many cases deciding important questions as to the rights of a person required to submit to such an examination have been disposed of by this court on just such an appeal as herein without question.

The regulation of such appeals has heretofore been held a legislative function rather than a judicial one. *Western Union R. Co. v. Dickson,* 30 Wis. 389, 392.

The right of an individual to be protected from any proposed examination which is without warrant of law is every whit as substantial a right as is that of an opposing party to have such an examination when thereunto lawfully entitled. Heretofore this court has entertained appeals by either side on such questions. From now on appeals by the latter will be heard, by the former will be dismissed.

In view of the continued acquiescence by the legislature in this statute without change; this court's former rulings thereon; the absence of any suggested evil or need of change, I see no good reason for now overturning the former long and well established rule.

SMITH, Respondent, vs. FEDERAL RUBBER COMPANY, Appellant.

December 5, 1919—January 13, 1920.

Malicious prosecution: Probable cause: Advice of counsel: Failure to advise of good reputation of plaintiff.

1. One who makes a complaint on the advice of a reputable attorney, after a full, fair, and honest statement to the attorney of all facts and information within his knowledge, honestly believing the person charged to be guilty, has probable cause, as a matter of law, for his action.
2. The defense of advice of counsel as probable cause does not fail because the complainant, before verifying the complaint, did not state to the district attorney that the person charged with the crime was of good character and reputation, where the district attorney advised him that the facts and circumstances communicated were in themselves good grounds for commencing a criminal action and proceeded upon the belief that the person complained against was of good standing in the community.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

This is an action for malicious prosecution. The complaint alleges that the plaintiff, a physician and surgeon, was maliciously arrested and prosecuted without probable cause, charged with having knowingly received tires stolen from the defendant company. Plaintiff claims damages in the sum of $10,000. The answer of the defendant sets forth probable cause and alleges that defendant acted throughout on the advice of counsel, namely, the district attorney of Milwaukee county.

It appears that in February, 1918, the defendant company was conducting an investigation into losses of tires, and Robert M. Lauer, assistant comptroller of the company, secured confessions from two employees, Brownell and Henry by name, in which they confessed to stealing tires and to selling them to different persons in the city of Milwaukee, among them *Dr. Smith.* These confessions were turned over to the district attorney. The district attorney and his assistant advised Lauer to sign the complaint against *Dr. Smith,* which he did.

The case was tried before the court and a jury. By a special verdict the jury found that when the defendant commenced criminal proceedings against the plaintiff on February 15, 1918, defendant did not have probable cause to believe plaintiff guilty of the offense charged in the complaint; that defendant acted maliciously in commencing the criminal proceedings; that Lauer did not make a full, fair, and honest statement of all material facts known to him bearing upon the question of the plaintiff's guilt of the offense to the district attorney or his assistant for the purpose of procuring legal advice thereon before commencement of the criminal proceedings against *Dr. Smith;* that Lauer did not act in good faith in commencing the criminal proceeding; that plaintiff is entitled to $2,000 compensatory damages and $500 punitory damages.

Judgment was entered on the verdict, from which judgment this appeal is taken.

For the appellant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *Paul R. Newcomb* and *J. G. Hardgrove,* all of Milwaukee.

For the respondent there was a brief by *Churchill, Bennett & Churchill* of Milwaukee, and oral argument by *W. H. Bennett.*

SIEBECKER, J. It appears that Henry, an employee of the defendant company, on February 7, 1918, confessed to stealing tires to Mr. Lauer. This confession was taken down in shorthand by his stenographer. The chief of police of the city of Cudahy was present, at Mr. Lauer's request. On the following day Brownell also confessed to being implicated in this theft. At this time Henry gave additional details of how the tires were taken, disposed of, and to whom they were sold. In the statement of Henry he declared that some of the tires so stolen were sold to *Dr. Smith,* the plaintiff in this action. Brownell at this conference confirmed Henry's statement that a pair of tires were sold to *Dr. Smith.* On February 9th the chief of police of Cudahy and Mr. Lauer presented the confessions and other matters to Mr. Zabel, district attorney of Milwaukee county, and, upon inquiry by Zabel, the chief of police of Cudahy informed him how the confessions were secured. Mr. Zabel thereupon had complaint made and secured the arrest of Henry and Brownell, who were being held in custody by the chief of police. On February 11th the district attorney and two assistants went over the confession in the presence of Henry, Brownell, Lauer, and others at the district attorney's office. Mr. Zabel questioned Henry and Brownell concerning the confessions and went into the details of the transactions of obtaining the tires, the quantity taken, to whom and the manner in which they had sold them, and obtained the names of the persons who bought the tires at a greatly reduced price. Mr. Zabel testified:

"After the confessions were presented to me and after I had examined Mr. Brownell and Mr. Henry . . . I advised the taking out of warrants for the arrest of Brownell and . . . Henry and for the arrest of the various persons to whom these two men admitted having disposed of stolen tires, including a warrant against *Dr. Smith.*"

The district attorney also stated that he informed Mr. Lauer that the purchaser committed a crime and that "they are all equally guilty, they are representative business men and they ought to know better. They don't ordinarily transact their business in this way." The assistant district attorney also advised Mr. Lauer that the purchasers had committed an offense and that the confessions of Henry and Brownell sustained the charge that *Dr. Smith* had knowingly bought stolen tires. It appears that Mr. Zabel informed Mr. Lauer that it was his duty to institute criminal proceedings against *Dr. Smith* and other purchasers of tires by swearing to the criminal complaint. The record shows that Lauer made a full and complete statement of the facts within his knowledge concerning the whole affair to the district attorney and his assistant before he signed the criminal complaint against *Dr. Smith.* It is a well established rule by the adjudications of this court that in an action for malicious prosecution, if a person makes a criminal complaint upon the advice of a reputable attorney, after a full, fair, and honest statement to such attorney of all the facts and information within his knowledge, honestly believing the person charged to be guilty, he has probable cause, as a matter of law, for his action. *King v. Apple River P. Co.* 131 Wis. 575, 111 N. W. 668; *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 126 N. W. 554; *Small v. McGovern,* 117 Wis. 608, 94 N. W. 651.

The nature and effect of such a defense in this class of actions was fully treated in the *King Case* and requires no further elaboration here. It is there stated:

"The term 'full and fair statement of all the facts' does

not mean all the facts discoverable, but all the facts within the knowledge of the person making the statement. If he knows facts enough, either personally or by credible information, which, when fully and fairly stated to reputable counsel for the purpose of obtaining legal guidance, results in advice which is honestly followed in commencing the criminal proceedings, that is sufficient."

The record in this case is clear that Mr. Lauer made a full and fair statement of all the facts and information within his knowledge to the district attorney; that he believed that the plaintiff was guilty, and that he was advised by the district attorney that the facts constituted good legal ground for commencing criminal prosecution against plaintiff, and that he in good faith followed such advice. The respondent strenuously insists that the defendant failed to establish the defense of advice of counsel as probable cause, because Mr. Lauer did not state before swearing to the complaint that he had learned upon inquiry that *Dr. Smith* was the associate of good and reputable persons and that he, Lauer, believed from what he learned about him that *Dr. Smith* was a man of good character and standing in the community. This contention is of no avail in this case, for two reasons: first, that it is manifest that the district attorney advised him specifically that facts and circumstances communicated were in themselves a good and sufficient ground for commencing the criminal action; and secondly, that the district attorney evidently proceeded upon the belief that *Dr. Smith* had a good standing in the community, for he declared of him and the rest that those who purchased the stolen tires were representative business men who ordinarily did not transact their business in this way.

We are of the opinion that the trial court clearly erred in holding that the defense of advice of counsel was not established as a matter of law. It is considered that the record clearly establishes that Mr. Lauer signed the criminal complaint upon the advice and direction of the district attorney after he had fully, fairly, and honestly stated to

him all the facts and information within his knowledge, which the district attorney deemed sufficient to show that *Dr. Smith* bought the tires knowing them to be stolen property, and that Lauer honestly believed *Dr. Smith* guilty of violating the law as advised by the district attorney. Upon this state of the case it was error to award judgment against the defendant.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to award judgment dismissing plaintiff's complaint.

WILL OF LAUBURG: LAUBURG, Respondent, vs. IHMIG and another, by guardian *ad litem,* Appellants.

December 6, 1919—January 13, 1920.

Wills: Proof of lost will: Witnesses: Competency: Communications with deceased persons: Appeal: Facts shown otherwise than by incompetent witness: Harmless error.

1. Where decedent in a general conversation addressed to all within hearing made certain statements as to his will, those present all being persons interested in the estate, such communication could not, under sec. 4069, Stats., be testified to by those present.
2. Permitting a witness to testify as to a conversation with a deceased person, in violation of sec. 4069, was harmless where the facts covered by the testimony were shown by other competent witnesses whose testimony was uncontradicted.
3. In a proceeding to have an alleged lost will admitted to probate, the evidence is *held* sufficient to overcome the *prima facie* presumption that the will had been destroyed.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The proponent originally filed a petition in the county court of Milwaukee county for the establishment of an alleged lost will of Anna Lauburg, deceased, mother of the proponent. The contestant was appointed by the county

court as guardian *ad litem* of *Herbert* and *Beatrice Ihmig,* children of a deceased daughter of Anna Lauburg. He filed his objections to the establishment of the alleged lost will. The matter was heard before the county court and decision was rendered refusing to establish the alleged copy of decedent's will as the last will and testament of Anna Lauburg.

Appeal was taken to the circuit court for Milwaukee county. A trial *de novo* was had. The circuit court found that Anna Lauburg at the time of her death was a woman seventy years of age; that she left surviving her seven children and two grandchildren, minor children of a deceased daughter; that the four daughters, Mary, Annie, Nellie, and Rose, are married and in comfortable financial circumstances; that Henry is unmarried and capable of earning his livelihood; that the son Fred has been mentally and physically incapable of supporting himself and had for many years been supported by his mother and father while they were living and by his sisters since his mother's death; that the decedent in November, 1913, made a will disposing of her estate, which amounts to about $10,000, whereby she gave her estate, subject to small bequests and after giving the other children $500 each and excluding the grandchildren by name, one half to *Lillian,* who had remained at home and helped care for her invalid father during his life and the invalid brother, and the other half in trust for the benefit of Fred; that in May, 1915, decedent made another will revoking the former will, disposing of her estate as she did before to *Lillian* and in trust for Fred, increasing the minor bequests somewhat, and again excluding the grandchildren; that she knew the making of the second will revoked the former; that shortly before her death, on different occasions, she expressed satisfaction with the second will and that she had thus provided for her son Fred. The court also found that she did not intend to die intestate nor to revoke the last will made by her.

The court held that the second will had been lost, and that it had been duly proved and established, and that it is entitled to probate. Judgment was entered reversing the judgment of the county court, and the proceeding was remanded to the county court to proceed in accordance with the judgment of the circuit court and to probate the will and administer the estate according to law. This is an appeal from such judgment.

Arthur Breslauer of Milwaukee, guardian *ad litem,* for *Herbert* and *Beatrice Ihmig.*

A. A. Cooper of Milwaukee, for the respondent.

SIEBECKER, J. It is contended that the trial court erred in permitting three of decedent's daughters, who have an interest in her property under the will, to testify to transactions and communications had by them personally with the deceased. The evidence objected to was to the effect that the decedent had conversation with some of her children on several occasions at her home; that these witnesses were present; that they did not take an active part in the conversations; that the decedent stated in effect that she had made a will disposing of her property and that she had provided for Fred. It appears that these conversations were general and addressed to those within hearing. The circumstances under which the words were spoken and the nature of the communication show that they were in substance a personal communication between the deceased and those who were present and heard them, and hence come within the prohibition of sec. 4069, Stats. The facts covered by this testimony were, however, shown by other competent witnesses whose testimony is uncontradicted, so that the improper admission of these communications and conversations was not prejudicial. We have examined the other exceptions to rulings of the court admitting evidence over appellants' objections and find they were proper, and no detailed discussion of them is deemed necessary. The

principal issue on this appeal is presented by the claim of the appellants that the evidence does not sustain the trial court's findings that the will made by the decedent on May 5, 1915, was not revoked by her during her lifetime and that it is entitled to be established and probated as her last will. The record shows that the trial judge is sustained in holding that the material facts of the case are not in dispute. Upon the undisputed facts he found that the testator was an intelligent person; that she knew when she made her last will on May 5, 1915, that she revoked her former will and that if she died intestate all of her children and the children of her deceased daughter would share equally in her estate; that she was fully aware of Fred's dependency and appreciated the sacrifices of her daughter *Lillian* in staying home to assist testator in caring for the invalid father and brother, Fred, through a long period of years after arriving at her majority; that the testatrix up to the time of her death intended to make provision for Fred and *Lillian* as she did make it in both wills; that a short time before her death she obtained her last will from the custody of her attorney for the purpose of placing it in her safety-deposit box at the bank; that she understood the first will, which she left in this deposit box in an envelope, was revoked by the second will and that she intended to destroy it; that through inadvertence or otherwise she left it in such box, removed from the envelope, which empty envelope was found in this box; and that the last will could not be found. Many of the circumstances shown by the evidence are persuasive and clear in their implication, which support the findings of fact of the circuit court. The appellants, however, insist that the evidence is not of sufficient probative weight to overcome the *prima facie* presumption, predicated on the loss of the will, that she destroyed it with the intention of revoking it. *Valentine's Will,* 93 Wis. 45, 67 N. W. 12; *Estate of Johnson, ante,* p. 436, 175 N. W. 917.

The facts and circumstances disclosed by the evidence

tend to show that the testatrix up to the time of her death had made declarations tending to show the existence of her will and had no intention of revoking her second will, and that she steadfastly adhered to her purpose of providing for her son Fred and her daughter *Lillian* as she had done in this will. In the light of the evidence we cannot say that the trial judge's findings of fact are against the clear preponderance of the evidence. We think the trial court was justified in concluding that the *prima facie* presumption that the will had been destroyed was overcome by the facts and circumstances adduced in evidence. *Steinke's Will,* 95 Wis. 121, 70 N. W. 61; *Gavitt v. Moulton,* 119 Wis. 35, 96 N. W. 395.

By the Court.—The judgment appealed from is affirmed.

STATE EX REL. STERN MILLING COMPANY, Appellant, vs. TAX COMMISSION OF WISCONSIN, Respondent.

STATE EX REL. BERNARD STERN & SONS, INC., Appellant, vs. TAX COMMISSION OF WISCONSIN, Respondent.

December 6, 1919—January 13, 1920.

Taxation: Deduction of federal income tax.

1. Sub. (d), sec. 1087*m*—3, Stats. (the income tax act), authorizing the deduction from gross income of taxes imposed by any state or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by the Wisconsin act is derived, does not authorize the deduction of federal income taxes, since such taxes are not imposed by any state, or territory or possession of the United States, nor are they imposed upon the source from which the income taxed by the Wisconsin law is derived.
2. Sub. (b), sec. 1087*m*—3, authorizing "ordinary and necessary expenses" incurred in business to be deducted in calculating income taxes, does not authorize the deduction of federal income taxes, since such taxes are not peculiarly an expense of transacting business and the question of deducting taxes is specifically dealt with by sub. (d) of the same section.

APPEALS from orders of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Certiorari to review income tax assessments made by the *Tax Commission.* The relators herein are corporations, each keeping its accounts on a basis other than of actual cash receipts and disbursements, each having a fiscal year ending on the 31st day of August, 1918, and each making return for assessment of its income on a basis other than of cash receipts and disbursements, to wit, on an accrual basis, with the consent of the *Tax Commission.* In reporting their incomes for the year ending August 31, 1918, each deducted the amount of the federal income tax thereafter to be assessed on its income earned during the same period. The *Tax Commission* disallowed the deduction and assessed the state income tax upon the amount of the income returned, without such deduction. Writs of *certiorari* directed to the *Tax Commission* were issued out of the circuit court for Dane county. The *Tax Commission* moved to supersede the writs and, in due time, the circuit court entered orders superseding said writs. These are appeals from such orders.

For the appellants there was a brief by *Kaumheimer & Kenney* of Milwaukee, and oral argument by *William Kaumheimer.*

For the respondent there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

OWEN, J. The precise question to be determined is this: May the relators, in making return of their income for the year ending August 31, 1918, anticipate the amount of income taxes which the federal government will later on assess against the income earned by them during such period and deduct the amount of such anticipated federal income taxes from their income earned during the year ending August 31, 1918? An answer to the question must

depend upon a construction of our own statutes. *Estate of Week,* 169 Wis. 316, 172 N. W. 732. Sec. 1087*m*—1, Stats., provides as follows:

"There shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter, by such persons and from such sources as hereinafter described; provided, that firms, copartnerships, corporations, joint-stock companies and associations which customarily close their annual accounts on a date other than December 31, or which customarily estimate their income or profits on a basis other than of actual cash receipts and disbursements, may, with the consent and approval of the tax commission, return for assessment and taxation the income or profits earned during the business year for which the accounts of such person are customarily made up."

Sec. 1087*m*—2 specifies what shall be considered income for the purposes of the act. The provisions of that section are not material here. Sec. 1087*m*—3 provides what may be deducted from the gross income of corporations. If the deduction claimed by relators can be allowed, it is by virtue of the provisions of sub. (b) or (d) of that section. Sub. (b) provides that there may be deducted—

"Other ordinary and necessary expenses and cash bonuses to employees, actually paid within the year out of the income in the maintenance and operation of its business and property, including a reasonable allowance for depreciation by use, wear and tear of property from which the income is derived. . . ."

Sub. (d), at the time the relators were called upon to make their returns, authorized deductions for—

"Sums paid by such person within the year for taxes imposed by any state of this union or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by this act is derived."

There are two reasons why the deductions claimed are not authorized by sub. (d). One is, that no income tax of any kind, nature, or description is authorized by its terms to be

deducted. The only taxes the deduction of which is authorized are taxes imposed upon the source from which the income taxed by the act is derived. Relators claim that a tax imposed upon incomes is a tax upon the source from which they are derived, and cite to that proposition *Pollock v. Farmers' L. & T. Co.* 158 U. S. 601, 15 Sup. Ct. 912. Under our constitution property tax means one thing and income tax another. A tax on income is not a tax on property. The philosophy of the *Pollock Case* does not apply here in view of our constitutional provision. *Income Tax Cases,* 148 Wis. 456, 507, 134 N. W. 673, 135 N. W. 164. The language of sub. (d) contemplates a tax imposed directly upon the property from which the income is derived, and, for the purposes of that statute, a tax imposed upon income is not a tax imposed upon the source from which the income is derived. Another answer to the proposition is this: Sub. (d) authorizes the deduction only of taxes "imposed by any state of this union or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by this act is derived." If we were to construe an income tax as a tax imposed upon "the source from which the income taxed by this act is derived," it could not be held that the federal income tax is imposed "by any state of this union or any subdivision thereof, or any territory or possession of the United States," and such a construction would not serve the purpose of the relators. Sub. (d), therefore, as it existed at the time relators were required to make their income tax returns, is not susceptible of a construction which will enable them to deduct federal income taxes even though they have been actually paid during the year ending August 31, 1918.

Relators further contend that if the deduction is not authorized by sub. (d) it is authorized by sub. (b), as being "ordinary and necessary expenses . . . actually paid within the year out of the income in the maintenance and operation

of its business and property." Waiving the question of whether, in order to be deducted, the tax must have been actually paid, in view of the fact that the books of account of these corporations were kept on what is called an accrual basis, we have little difficulty in arriving at the conclusion that the terms "other ordinary and necessary expenses," used in sub. (b), do not include the federal tax in question. In the first place, taxes are not peculiarly an expense of transacting business. They are no more an expense of business than they are an expense of loafing. They represent the price which every citizen must pay for the privileges and the protection of government. The man of leisure who derives his income from investments and securities is subject to the tax as well as the man whose income is the result of business efforts. The general property tax is a tax computed upon the value of property. The income tax is a tax laid upon the individual in proportion to his ability to pay, such ability being measured by his income, and whether his income is the result of business effort or otherwise is in no sense material. We do not overlook the fact, of course, that the business man in fixing his margin of profit must take into consideration the tax burden which he will be called upon to meet. This is true as well of many other fixed items of expense which in no sense constitute an expense of doing business. Then, too, it must be remembered that "income" for the purposes of taxation is not necessarily identical with "income" for other purposes, the declaring of dividends for example. For taxation purposes "income" is to be determined in accordance with rules laid down by the statute, and it may well happen that the application of such rules will not establish the real net income in many instances, neither is it necessary that they should. The ultimate object to be attained is not to fix the real net income, which is left for the use and enjoyment of the producer thereof, but to arrive at a basis upon which a tax measured by his ability to pay is to be computed.

But a more conclusive answer to the proposition that the terms "other ordinary and necessary expenses" do not include the tax in question is found in the fact that the statute authorizing deductions specifically deals with the question of taxes. If the legislature considered that the item of taxes falls under the general head of "other ordinary and necessary expenses," then sub. (d) is entirely superfluous. It is apparent that the legislature did not so consider it, and in order to authorize deductions of sums paid for taxes, from the income, for the purpose of fixing the net taxable income, it specifically authorized the deduction of those taxes which it deemed proper should be deducted by the enactment of sub. (d). The legislature having specifically authorized the deduction of certain taxes in order to arrive at the net taxable income, it follows, upon well known principles of statutory construction, that no other taxes can be deducted. *Expressio unius est exclusio alterius.* That this was the legislative view is indicated by the fact that the legislature of 1919 (ch. 435) made provision for the deduction of federal income taxes in determining the amount of net taxable income under our laws.

These conclusions make it unnecessary to consider the contention of the relators that actual payment of the taxes was not necessary to authorize the deductions because their accounts were kept upon an accrual basis, for the reason that, whether paid or not, the statute did not authorize the deductions. It follows, therefore, that the orders of the circuit court superseding the writs should be affirmed.

By the Court.—Orders affirmed.

ESSEX, Plaintiff in error, vs. THE STATE, Defendant in error.

December 6, 1919—January 13, 1920.

Criminal law: Instructions on question of intent in statutory offenses: Intent a jury question: Food: Oleomargarine: Imitation of yellow butter.

1. While ordinarily it is sufficient, in defining a statutory offense, to define it in the language of the statute, where the guilt or innocence of the defendant depends on the question of intent, and instructions are properly requested on the subject, they should be given.
2. In order to establish the guilt of one accused of violating sec. 4607*c*, Stats., prohibiting the sale of oleomargarine in imitation of butter, it is necessary for the state to offer evidence tending to establish the fact that the article sold by the defendant was made with intent that the product, when completed, should be in imitation of yellow butter.
3. This intent, or the fact of conscious imitation of yellow butter, may be inferred, in a prosecution under said sec. 4607*c*, from the fact that the oleomargarine sold was in imitation of yellow butter.
4. While defendants in criminal cases are permitted to offer evidence as to their intent in the doing of a particular act, neither the court nor the jury is concluded by such evidence.
5. The term "yellow butter," in sec. 4607*c*, prohibiting the sale of oleomargarine which is in imitation of yellow butter, means butter of that shade or color which is usually and ordinarily described as yellow, as distinguished from pale straw, light yellow, or any shade of yellow lighter than that usually and commonly referred to as yellow butter, such as is produced in the summer time.

ERROR to review a judgment of the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Reversed.*

Plaintiff in error, hereinafter designated as the defendant, was found guilty of violating sec. 4607*c*; Stats. 1917, prohibiting the sale of oleomargarine which shall be in imitation of yellow butter, and prosecutes this proceeding to review the judgment of the superior court of Dane county.

For the plaintiff in error there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the defendant in error there was a brief by the *Attorney General, M. B. Olbrich,* deputy attorney general, and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker* and *Mr. Roman Heilman,* district attorney of Dane county.

ROSENBERRY, J. Two principal questions are presented: Did the court err in refusing to instruct the jury that sec. 4607*c,* Stats., is intended to prohibit the sale of oleomargarine made in intentional or conscious imitation of yellow butter, and that it is not intended to prohibit and does not prohibit the sale of oleomargarine not so made? and second, Did the court err in refusing to instruct the jury, as requested, that sec. 4607*c* did not prohibit the sale of oleomargarine of yellowish tinge or color, but not of that shade of yellow which is found in natural butter which is commonly and ordinarily described as *yellow* butter?

"Sec. 4607*c,* Stats. 1898, as amended by ch. 151, Laws 1901, under which the defendants were convicted, and so far as material here, provides that any person who 'shall by himself, his agent or servant, render or manufacture, sell or solicit or accept orders for, ship, consign, offer or expose for sale, or have in possession with intent to sell, any article, product or compound made wholly or partly out of any fat oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, and without the admixture or addition of any fat foreign to said milk or cream, which shall be in imitation of yellow butter produced from such milk or cream with or without coloring matter,' shall be punished, etc. 'Nothing in this section shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, and free from coloration or ingredient that causes it to look like butter.'" *Meyer v. State,* 134 Wis. 156, 114 N. W. 501.

The statute in question is peculiar and unusual in that it makes the intent of a third party the test of the guilt or innocence of the defendant. This peculiarity arises out of the language used in the statute. The statute was so construed at the January term, 1908, and although the legislature has been in regular session six times, no amendment has been made to the statute as so construed.

1. Ordinarily it is sufficient, in defining a statutory offense, to define it in the language of the statute. *Dillon v. State,* 137 Wis. 655, 119 N. W. 352; *State v. Bresee,* 137 Iowa, 673, 114 N. W. 45, 24 L. R. A. N. S. 103; *Giskie v. State,* 71 Wis. 612, 38 N. W. 334. Where, however, as in this case, the guilt or innocence of the defendant depends upon the question of intent, and instructions are properly requested upon that subject, they should be given, and it is error to refuse them. *Koscak v. State,* 160 Wis. 255, 152 N. W. 181.

It was said in *Meyer v. State,* 134 Wis. 156, 114 N. W. 501: "The words 'which shall be in imitation of,' used in describing the contraband compound, imply a conscious imitation in the manufacture thereof." Therefore, in order to establish the guilt of the defendant, it was necessary for the state in this case to offer evidence tending to establish the fact that the article sold by the defendant was made with the intent that the product when completed should be in imitation of yellow butter. This intent, or the fact of conscious imitation, may be inferred from the fact that the compound sold is in imitation of yellow butter, and if there be testimony tending to show that the compound sold was not made with the intent to imitate yellow butter, then the question of intent is for the jury upon the whole case. While defendants in criminal cases are permitted to offer evidence as to what their intent was in the doing of a particular act, neither the court nor the jury is concluded by such evidence. It is to be considered by the jury along with all other evidence in determining the intent, in this case not of the defendant but of the maker of the compound sold.

We think the jury should have been so instructed by the trial court.

2. It appears from the evidence received in this case that oleomargarine made in the usual and customary way and from the ingredients which are usually and ordinarily combined in its manufacture will be of some shade of yellow; that as a practical manufacturing proposition pure white oleomargarine cannot be produced. It also appears from the evidence in this case that natural butter—that is, butter produced from unadulterated milk and cream without the addition of dyes—varies in color from a whitish, light pale straw-color to deep orange yellow. Sec. 4607*c* expressly permits the sale of oleomargarine, and it must be presumed that the legislature knew and understood that oleomargarine when manufactured in the usual and ordinary way, out of the materials commonly combined to produce it, would be of the color of some kinds of butter. We need not determine in this case whether or not the legislature had power to prohibit the sale of oleomargarine which resembles in color any shade of natural butter; they did not attempt to do that in this statute. Its sale is prohibited only when it is in conscious imitation of yellow butter. It is impossible to put upon paper or into language a definition of yellow butter, but it is possible by a process of exclusion to make the term reasonably definite. As was said in the *Meyer Case, supra,* "It would be adding to the statute to construe it as prohibiting the sale of a compound in imitation of any light shade of yellow butter." Therefore it seems reasonable that the jury should be so instructed that they will have, approximately at least, the same standard by which to determine the guilt or innocence of the defendant. Otherwise one juror might agree to a verdict of guilty because he thought the compound sold resembled butter of a very light shade, another of a still deeper or darker shade—in fact each juror might have a different standard; and therefore, while no two agreed as to the meaning of the term *yellow butter,* they might all agree that the defendant was guilty. We think,

therefore, it was error for the trial court to refuse the requested instruction.

The jury should have been instructed that by the term *yellow butter* was meant that shade or color of butter which is usually and ordinarily described as yellow, as distinguished from pale straw, light yellow, or any other shade of yellow lighter than that usually and commonly referred to as yellow butter, which the evidence in this case shows to be butter of the color usually and commonly produced in the summer and sometimes known and described as "June butter." While such an instruction leaves much to be desired in the way of definiteness, it at least makes more definite a term which, as was said in the *Meyer Case,* is incapable of definition.

By the Court.—Judgment reversed, and case remanded for a new trial.

McCARTHY, Plaintiff in error, vs. THE STATE, Defendant in error.

December 6, 1919—January 13, 1920.

Pure food law: Constitutional law: Police power of state: Boric acid as a food: Definition of word by legislature.

1. The enactment of the pure food law (secs. 4600 *et seq.*, Stats.) was in the lawful exercise of the police power.
2. The legislature may provide its own definition of a word used in a law which it enacts, and, when it does so, that definition must necessarily control, regardless of dictionary definitions.
3. A preparation composed of ninety-five per cent. boric acid and five per cent. common salt, advertised and intended to be used as a preservative in the canning of all kinds of fruits and vegetables, is a violation of sec. 4601*e*, Stats., prohibiting the sale of food containing boric acid, such preparation being "a food" within the meaning of sec. 4600, as amended by ch. 202, Laws 1909, providing that "all articles used or intended for use as ingredients in the composition" of food or "in the preparation thereof" shall constitute food.

ERROR to review a judgment of the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Affirmed.*

McCarthy was convicted of violation of the pure food law (sec. 4601*e*, Stats.), and brings his writ of error to reverse the judgment. The facts were undisputed and were in brief as follows: *McCarthy* offered for sale and sold for use and consumption within the state a compound known as Mrs. Price's Canning Compound, composed of ninety-five per cent. boric acid and five per cent. common salt, advertised and intended to be used as a preservative in the canning of all kinds of fruits and vegetables. At the time of the sale, June 5, 1918, sec. 4601*e* provided that "No person . . . shall . . . sell . . . or offer for sale any article of food within the meaning of sec. 4600 of the statutes, which contains . . . boric acid . . . or any other preservatives injurious to health." Sec. 4600, after prohibiting the sale of any drug or article of food which is adulterated or any candy containing intoxicating liquor, further provides that "The term, 'food,' as used herein shall include all articles used for food or drink or condiment by man, whether simple, mixed or compound, *and all articles used or intended for use as ingredients in the composition thereof or in the preparation thereof.*" Sec. 4601*e* was first enacted in 1905 (ch. 33, Laws 1905), and at that time sec. 4600 did not contain the final clause quoted above in italics, but stopped with the word "compound." The clause in question was added to the section by ch. 202, Laws 1909.

For the plaintiff in error there was a brief by *Trafford N. Jayne* of Minneapolis and *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Mr. T. C. Richmond* and *Mr. Jayne.*

For the defendant in error there was a brief by the *Attorney General* and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker.*

WINSLOW, C. J. The legislature has determined that food used by our citizens ought not to contain boric acid because it is believed to be harmful to the health. In the lawful exercise of its police power the legislature has interdicted the sale of food containing boric acid by sec. 4601*e* of the Statutes, and has referred us to sec. 4600 of the Statutes for the definition of the word "food." Turning to the last named section, we find that the definition of food at the time of the sale in question included "all articles . . . intended for use as ingredients in the composition thereof or in the preparation thereof." It is entirely competent for the legislature to provide its own definition of a word used in a law which it enacts, and when it does so that definition must necessarily control regardless of dictionary definitions. So the question is not whether the compound in question is really a food or whether the definition provided by the statute is a logical one, but whether the compound was intended for use as an ingredient in the composition or preparation of food. If it was, then it was a "food" within the meaning of sec. 4601*e*, and as it contained ninety-five per cent. of boric acid its sale was prohibited by that section. We think the question must be answered in the affirmative. Clearly the compound is intended to enter as a constituent part into the food which it preserves, otherwise it could hardly have effect as a preservative; thus it necessarily becomes an ingredient in the composition thereof; and just as clearly the canning of fruit or vegetables is a part of the preparation of such fruit or vegetables for use as food. The fact that the canning operation may be removed by a considerable period of time from the final acts of preparation for the table does not make it any the less a legitimate part of the general work of preparation of the raw material for use as food.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

PESCHEL, Appellant, vs. KLUG and another, Respondents.

December 4, 1919—January 16, 1920.

Negligence: Falling of piled timber: Res ipsa loquitur: Question for jury.

1. Where an appliance under the management of defendant inflicts injury by reason of an abnormal and unexpected movement which could not have taken place had there been proper care exercised in its management or supervision, the abnormal action, in the absence of satisfactory explanation, affords evidence of lack of such care.
2. Where three timbers, weighing 1,600 pounds each, were piled parallel with the line of an alley, and the top timber fell and injured one frequenting the alley, the falling of the timber, in the absence of satisfactory explanation, afforded evidence of lack of care in piling; and the question whether the timbers fell because of insecure piling, or whether the fall resulted from the swerving of a truck against them, is for the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Personal injuries. In November, 1916, the plaintiff was a laborer working for the manufacturing firm of Lindemann & Hoverson at their plant in Milwaukee. On the day of the accident in question (November 15th) he was carting lumber to be distributed to various points in the plant on a hand truck, in which operation he was assisted by a helper who pushed behind. The truck and its load weighed about 600 pounds. It had an iron handle in front by which the plaintiff pulled it. The defendants were contractors engaged in the construction of a large building for Lindemann & Hoverson, located ten to twenty-five feet north of a twelve foot east-and-west alley running through the yard. Several days before the accident *Klug* and *Smith* had left three large pine timbers, sixteen feet long and fourteen by sixteen in breadth and thickness and intended to be used in their building operations, lying along the north side of the alley, two below and one above. The timbers were practi-

cally parallel with the line of the alley and lay on the ground just north of the alley, but extending perhaps a few inches into the alley. The alley itself was paved with concrete blocks, and several witnesses testified that it had holes and ruts worn in it between the blocks. The lower timbers were laid upon some loose bricks and a piece of timber so as to keep them from dampness, and the other timbers lay on top of them. Just before the accident happened the plaintiff and his helper, with the loaded truck, were proceeding eastward through the alley, as was the custom, and when they reached a point south of and immediately adjacent to the three timbers were obliged to stop and wait for the unloading of some joists from a wagon in the alley just to the eastward. The wagon was unloaded in a few minutes and was backed out of the way. At this point in the transaction the evidence becomes contradictory. The plaintiff testified that as he was still standing before his truck looking southward and before he attempted to move the truck, the top timber of the three fell from some cause unknown to him and broke his leg. His helper testified on direct examination that he and *Peschel* were standing still at the time the timber fell and that the truck was standing still, but on cross-examination he testified that "after the wagon passed, *Peschel* and I took hold of the truck, I was on the rear and he was in the front, and the truck moved about a foot before the accident happened." He also testified that the timber which fell was lying on top of the other timber on a slant, but there was no other testimony to this effect. On the other hand, three apparently disinterested eye-witnesses relate an entirely different story. Two men named Lussa and Domoris, who were at the time in the employ of *Klug* and *Smith,* were helping to unload the joists from the wagon before mentioned at the time the plaintiff stopped with his truck near the timbers. Both of these men saw the accident, and both testify in effect that after the wagon moved out of the way the plaintiff and his

helper started to move the truck and couldn't start it, so Domoris went to the back of the truck and helped push, and it moved forward four or five feet, and one of the wheels ran into a hole or rut four or five inches deep between the concrete blocks, and that in the struggle to right the truck the front axle and handle swung around against the lower timber, causing the upper timber to fall over on the plaintiff. One Riese, the defendants' foreman, also saw the accident and gives the same account of it. These three witnesses also agree that the timbers had been there several days, perhaps a week, and that they lay level and solid. Domoris helped to put them there originally, and he and other employees walked over them in going to and from lunch.

A verdict for the defendants was directed, and from judgment thereon the plaintiff appeals.

William A. Schroeder and *Horace B. Walmsley,* both of Milwaukee, for the appellant.

For the respondents there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee, and oral argument by *Mr. Doe.*

WINSLOW, C. J. Our statute provides (sec. 2394—48) that every employer shall furnish a place of employment which shall be safe for employees therein "and for frequenters thereof," and the appellant's contention is that, in view of the testimony of the plaintiff and his helper that the truck had not moved or touched the timbers before the topmost timber fell, there was a question for the jury as to whether the timbers did not fall because improperly and insecurely piled, or, in other words, because of a violation of this safe-place statute, it being undisputed that the plaintiff was a "frequenter" of the place though not an employee of *Klug* and *Smith.* It is an undisputed fact that the timbers were placed there by the employees of *Klug* and *Smith* for ultimate use in the building which they were con-

structing, and it seems clear that *Klug* and *Smith* had the right to decide, and did in fact decide, where they should be placed and how they should be piled. It is a principle quite well established that where a machine or appliance, under the management of defendant, inflicts an injury by reason of an abnormal and unexpected movement which could not have taken place had there been proper care exercised in its management or supervision, the very fact of the abnormal action, in the absence of satisfactory explanation, affords evidence of lack of such care. *Cummings v. Nat. F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Carroll v. C., B. & N. R. Co.* 99 Wis. 399, 75 N. W. 176.

No reason is perceived why the principle does not apply to this case. The timbers were piled on the margin of the alley by the defendants in the prosecution of their business and were in their care. It was their duty under the statute to so pile them that the alley could be safely used in the usual and ordinary manner by their employees and other frequenters. If the timbers fell on such an employee or frequenter without the application of force or violence, that fact itself would necessarily be evidence of unsafe piling. There was evidence, which cannot be said to be incredible, that such was the case here; hence the question as to whether the timbers were piled in such an insecure way that they fell on the plaintiff in obedience to the laws of gravitation and without other or adequate cause was a question for the jury.

It will not do to say that, because three witnesses testified that the front wheels and handle of the truck swung around and struck the timbers, the fall of the top timber is satisfactorily explained and the principle of *res ipsa loquitur* does not apply. In the first place, the plaintiff and his helper testify directly that the truck did not touch the timbers before the fall of the top timber, and we cannot say that this testimony is incredible or so at variance with undisputed physical facts as to leave no jury question. In

the second place, if it be conceded that the wheel or handle of the truck did strike the timbers, the questions whether some such an occurrence ought reasonably to have been anticipated by the defendants, and, if so, whether in view of such anticipation the piling was insecurely done, would still remain. It is an undisputed fact that the timbers were large and heavy timbers weighing from 1,600 to 1,800 pounds each, and it is mere matter of common knowledge that it would take a blow of great force to make the top one fall if they were piled level and on a secure foundation. It is plainly a jury question in this case whether the blow alleged to have resulted from the slewing of the truck would have been sufficient to cause the timber to fall had the piling been properly done.

The jury questions at the close of the evidence may be summarized as follows: (1) Were the timbers piled so insecurely that the alley in their vicinity was unsafe for employees and frequenters using the alley in the ordinary and usual manner? (2) If "Yes," then did the top timber fall solely because of such insecure piling, or did it fall because of the insecure piling and a blow from the truck combined? State which. (3) If from the two causes combined, then ought defendants to have anticipated, when the timbers were piled, that such an event as the blow from the truck might probably happen?

No claim of contributory negligence apparently was made on the first trial, but if such claim be made upon the new trial it may become necessary to submit another question covering that subject.

By the Court.—Judgment reversed, and action remanded for a new trial.

HAHN, Administrator, Respondent, vs. KEITH and others, Appellants.

October 8, 1919—February 10, 1920.

Tenancy in common: Adverse possession: Permissive possession ripening into adverse: Ouster of cotenants: Notice: Evidence: Burden to show permissive possession: Limitation of actions: Limitation running against cotenant continuing as to minor heir: Taxation: Redemption from tax sale by minor: Appeal.

1. The initial possession of a father's farm by a son who remained in possession after his father's death was permissive, but by declarations or acts, or both, such possession could have become adverse as to other children.
2. Continuous and exclusive possession of land for over twenty years raises the presumption that possession is adverse and throws the burden of proof upon the true owner to show that it was permissive.
3. There may be an ouster of cotenants by adverse possession; and the best evidence of ouster by a tenant in common is the exclusive actual possession of one claiming to hold adversely.
4. Actual notice that the possession of a tenant in common is adverse as to his cotenants may be given by acts as well as by declarations.
5. Where a son who had remained in possession of his father's farm following the father's death had been in exclusive, notorious possession for thirty years, treating the land as his own, making valuable improvements, paying taxes, and using the proceeds of the crops, and where other heirs who had knowledge thereof never questioned the son's right to so occupy the farm and during such time never asked for an accounting, the trial court was warranted in finding that the son's possession was adverse to that of the other heirs, notwithstanding their claim that they had permitted him to use the farm expecting to receive their share upon his death.
6. Where the statute of limitations began to run in favor of a son in possession of the farm of his deceased father as against another heir, it also began to run as to an infant child of such heir. But such rule would not apply to redemption by a minor from a tax sale, sec. 1166, Stats., giving him one year after reaching majority within which to redeem.

ESCHWEILER, KERWIN, and ROSENBERRY, JJ., dissent.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

Action begun June 4, 1917, to quiet title to eighty acres of land originally owned by William Keith, the plaintiff's father. The defendants claimed title to the land as heirs and cotenants of plaintiff and asked for partition and an accounting. Joseph Keith, the original plaintiff, has died since the appeal was taken and his administrator, *W. H. Hahn,* has been substituted in his place, but for convenience Joseph Keith will be called the plaintiff. William Keith, the father of plaintiff and the common ancestor of the parties, died about 1862 leaving him surviving (1) a daughter, Rachel Jessop, now deceased, who left two daughters, *Fanny Almy* and *Nellie Jessop;* (2) Joseph Keith, the plaintiff; (3) Margaret Coyne, now deceased, who left three daughters, *Catherine Burns, Margaret Kehrer,* and Maria Logan, the latter of whom died in 1906 leaving a son, *George Logan,* sixteen years of age at the time of the trial; (4) *Elizabeth Jessop;* (5) Nancy, deceased without issue; (6) *Iona Winnerston;* and (7) *George Wesley Keith.* Sarah Keith, his widow, never remarried and died in 1892. She continued to live on the farm till November, 1883, when she moved therefrom, never to return to it as her residence.

Plaintiff claimed title to the land through a deed from his mother executed in 1883 and adverse possession since the death of his father. The substance of the testimony relating to adverse possession is as follows: After the death of the father the mother of plaintiff and the children, of whom plaintiff was the oldest son, continued to live on the farm as a family. As soon as the other children reached a suitable age they went out to work, returning to the farm occasionally for longer or shorter periods as convenient. After they left the farm they contributed very little to the support of their mother. Joseph was married in 1871 and

had eight children. His wife died about 1893, and he never remarried. In 1883 he received a warranty deed from his mother purporting to convey the whole eighty acres to him. The deed was recorded in 1901. He gave his mother a mortgage when the deed was delivered, which was recorded January 4, 1884. In 1896 he executed and recorded a mortgage to one Lizzie Fish, and another one in 1901. Plaintiff lived continuously upon the farm after the death of his father up to the time of the trial, except for about two years prior to November 3, 1883, when he lived on an adjoining farm, and from November, 1883, he had exclusive possession of the farm till the time of the trial. From 1875 to 1882 the land was assessed to plaintiff and he paid the taxes, and the same is true since 1884. So far as use and occupancy are concerned, the plaintiff treated the farm as his own. He made valuable improvements thereon and never was asked to and never did account to any one for the proceeds of the farm. He supposed his mother and the other children had an interest in the farm when the father died, but seemed to have no clear conception of what each one's interest was. The brothers and sisters still living testified to the effect that they were satisfied to let plaintiff have the use of the farm while he lived, and supposed that upon his death they would receive their share. This was the chief reason why they never asked for an accounting or asserted title till this action was brought. The grandchildren naturally did not know much about the matter.

The court found that plaintiff had title by adverse possession, and entered judgment quieting title in him. The defendants appealed.

For the appellants there was a brief by *F. R. Bentley* of Baraboo, attorney, and *Henry Bohn* of Reedsburg, guardian *ad litem* for *Wesley Keith,* and oral argument by *Mr. Bentley.*

For the respondent there was a brief by *Stone & Quimby* of Reedsburg, and oral argument by *James A. Stone.*

The following opinion was filed November 6, 1919:

VINJE, J. Unquestionably plaintiff's initial possession was permissive and not adverse, but permissive possession may ripen into an adverse one by declarations or acts, or both. 2 Corp. Jur. p. 124, §§ 210, 133, and 228; *Bartlett v. Secor,* 56 Wis. 520, 14 N. W. 714; *Meyer v. Hope,* 101 Wis. 123, 77 N. W. 720. And continuous and exclusive possession of land for over twenty years raises the presumption that possession is adverse and throws the burden of proof upon the true owner to show that it was permissive. *Bartlett v. Secor, supra; Meyer v. Hope, supra.* There may also be an ouster of cotenants by adverse possession. 1 Ruling Case Law, 743.

In this case the evidence is practically undisputed, and the question is whether the finding of the trial court that plaintiff had gained title by adverse possession is so clearly wrong as not to be a permissible inference from all the evidence. If it is a permissible inference we ought not to disturb it. *Meyer v. Hope,* 101 Wis. 123, 77 N. W. 720. It is argued by defendants that in making its findings of facts the trial court overlooked the rule that as cotenants actual notice of adverse possession must be brought home to them and that the evidence fails to establish such notice. It is true that no actual notice by declaration is shown, but actual notice may be given by acts as well as by declarations. And so, also, the best evidence of ouster is the exclusive, actual possession of the one claiming to hold adversely. 1 Ruling Case Law, 702. Here plaintiff was in possession of the land for nearly fifty years, rendering an account therefor to no one. He was in the exclusive, notorious possession of it for some thirty years previous to the commencement of the action, to the knowledge of the defendants, treating it in every respect

as his own. He made valuable improvements upon it, paid the taxes, and used the proceeds of the crops as his own. Since their father or grandfather died they never questioned the right of plaintiff to so occupy and use the farm, and never asked for any accounting till this action was brought. From such admitted facts it seems to us the trial court was justified in inferring that plaintiff's possession was adverse, to the knowledge of the defendants, and that their explanation of the reason why they permitted him to occupy the farm did not satisfactorily rebut the presumption arising from his long-continued open, notorious, and exclusive possession that it was adverse. This subject is quite fully treated in *Meyer v. Hope,* 101 Wis. 123, 77 N. W. 720, and in the Wisconsin cases therein cited, and will not therefore be rediscussed here. Suffice it to say that we cannot set aside the trial court's finding of fact as to adverse possession.

Since the statute of limitations began to run against the mother of *George Logan,* a minor defendant, it also began to run against him. *Swearingen v. Robertson,* 39 Wis. 462. But of course such a rule does not apply to redemption by minors from tax sales, because sec. 1166, Stats. 1917, gives them one year after reaching majority within which to redeem. *Karr v. Washburn,* 56 Wis. 303, 14 N. W. 189; *Corry v. Shea,* 144 Wis. 135, 137, 128 N. W. 892.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). Although the court below based its conclusion that plaintiff was owner apparently upon two grounds: first, more than twenty years' adverse possession, and second, by entry under the deed from his mother of November, 1883, recorded August 17, 1901, and more than ten years' possession thereunder, yet the majority opinion mentions only the first ground as the basis of its judgment. The opinion specifies no definite time when the plaintiff flung to the breeze his banner of exclusive

ownership (*Ill. S. Co. v. Jeka,* 123 Wis. 419, 430, 101 N. W. 399) so as to transform what was until then concededly permissive possession into adverse possession. There was no change in the manner of his possession of this farm, so far as these cotenants were concerned, during the entire period from his father's death in 1862 until the commencement of this action; he farmed it, improved it, and took its proceeds as well before as after 1883, and the permission given by his cotenants was exactly the same during the entire period. So that neither the form nor manner of the possession or of the permission has changed. That being so, it would seem as though the element of good faith between cotenants holding through the same source of title would require some positive declaration or act brought home to his cotenants of his intention to repudiate their rights and assert an exclusive one in himself. If not, then cotenants are on the same footing as strangers. But this court has never so regarded them. *Hunter v. Bosworth,* 43 Wis. 583, 592; *Sydnor v. Palmer,* 29 Wis. 226, 249; *McPherson v. Featherstone,* 37 Wis. 632, 643; *Bourne v. Wiele,* 159 Wis. 340, 343, 150 N. W. 420. The same rule of actual notice should apply here as is applied between mortgagor and mortgagee. *Bur v. Bong,* 159 Wis. 498, 503, 150 N. W. 431.

Reliance is placed upon his improvements, yet that of the building of the house was in 1882, before the deed from his mother, while she was in possession, and to replace the old one then burned, and therefore that could not be fairly treated as a hostile act. The barn, erected at a cost of $1,000, was not built until 1901, so that if that was a raising of the flag of invasion it has not yet ripened into title. His improvements, therefore, ought not to be deemed as acts of ouster as evincing a settled purpose to exclude his cotenants. Some such purpose must appear. *Ipswich v. Proprietors, etc.* 218 Mass. 487, 491, 106 N. E. 169.

Reliance is placed upon his payment of taxes, yet this

court has held that he can acquire no rights as against his cotenants by the purchase of a tax title. *Hannig v. Mueller,* 82 Wis. 235, 52 N. W. 98; *Allen v. Allen,* 114 Wis. 615, 91 N. W. 218. See, also, *Harris v. Brown* (Iowa) 169 N. W. 664. The mere payment of such taxes ought not to give him a safer foundation upon which to build his new and adverse title than such a purchase would.

The court below found laches on the part of defendants. Yet this court in *Saladin v. Kraayvanger,* 96 Wis. 180, 70 N. W. 1113, where there was no notice of any change in the character of the holding by the one asserting such a claim against his cotenants, denied such a defense. If there were laches, there certainly ought to be some definite time established when the existing relationship of the parties should have been changed. Unless the front end of such period of the twenty years is certain and fixed, the other end is rather wavering and uncertain. No particular time is suggested when that which was concededly permissive should have been halted by some affirmative act or declaration on the part of defendants or was halted by an affirmative act on plaintiff's part. Some such act or declaration is necessary. *Lecroix v. Malone,* 157 Ala. 434, 47 South. 725; *Hynds v. Hynds,* 274 Mo. 123, 202 S. W. 387; *Zimmerman v. First Nat. Bank* (Mo.) 201 S. W. 852. The defendants ought not to be penalized for their continued charitable permission.

The case cited in the majority opinion of *Bartlett v. Secor,* 56 Wis. 520, 14 N. W. 714, was not one involving tenants in common, but between persons claiming through different conveyances, and therefore not controlling in this case; and the same is true of *Meyer v. Hope,* 101 Wis. 123, 77 N. W. 720. In the latter case, in defining adverse possession, the expression there used includes the word "unexplained" as one of the essential elements of such possession, as well as its needing to be notorious, exclusive, and continuous. But here the testimony of plaintiff himself does explain, and explain clearly, that he thought the de-

fendants had some interest in the land, shows that his possession was permissive, that defendants had title, and leaves unexplained only his failure to deny to them, at any time prior to the commencement of this action, such existing right on their part. The same case, page 126, shows also the very substantial fact, not here present, that the original owner had presumptive knowledge of the claim of exclusive ownership by being a witness to the very instrument, a mortgage, in which such assertion was made. It is also said, page 127, "permissive possession, however long continued, does not make title," and on the same page quotes with approval from *Kirk v. Smith,* 9 Wheat. 241, the following: "It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title." This court has also said in *Challefoux v. Ducharme,* 4 Wis. 554, 565, that silent possession accompanied by no act which can amount to an ouster is insufficient upon which to found title by adverse possession.

The finding by the court below that the defendants ought to have known since 1883 of plaintiff's hostile claim, and upon which finding the majority opinion affirms the judgment, is rather an inference or conclusion of law gathered from undisputed facts than the judicial determination as to where the truth lies, arrived at when there is dispute over facts, and therefore the former is not so controlling in this tribunal as the latter. *Weigell v. Gregg,* 161 Wis. 413, 416, 154 N. W. 645.

The plaintiff assumed the burden of showing title as against his cotenants, all claiming under the same ancestor, and I do not think he has overcome the record title, and that defendants should have judgment.

I am authorized to state that Justices KERWIN and ROSENBERRY concur in this dissent.

A motion for a rehearing was denied, with $25 costs, on February 10, 1920.

LEZALA, Appellant, vs. JAZEK and others, Respondents. WOJOIECHOWSKI and another, Respondents, vs. LEZALA, Appellant, and others, Respondents.

November 4, 1919—February 10, 1920.

Workmen's compensation: Evidence to support finding of industrial commission: Wife interested in husband's business: Appeal: Relief to party not appealing from judgment: Right to appeal: Waiver: Parties entitled to notice to review error.

1. A judgment of the circuit court is binding and conclusive upon all affected thereby until reversed on the appeal of those claiming it to be erroneous; and on the appeal of one judgment defendant the supreme court cannot, on reversal, disturb the judgment as to nonappealing defendants, though they file a brief alleging error.
2. Though the findings of the industrial commission are conclusive upon the court if any reasonable view of the evidence supports them either directly or by fair inference, every finding of fact made must have some substantial evidence in its support, though not necessarily a preponderance; and a finding cannot be based on mere conjecture.
3. The evidence in this case is *held* insufficient to support a finding of the industrial commission that a wife was interested in her husband's contracting business so that his employee was her employee as well.
4. One of the appropriate functions of a brief filed in the supreme court is to direct the attention of the court to pertinent matters appearing in the record; and in the absence of any indication on the part of moving defendants that a notice under sec. 3049*a*, Stats., for the review of an error affecting them was on file in this court, a search of the record for the discovery of such document on the part of the court was not to be expected.
5. Only the party whose interest is adverse to the appellant may secure a review of errors by giving the notice provided for by sec. 3049*a*.
6. Sec. 3049*a* will not be construed so as to entitle a co-judgment defendant not appealing to a review of alleged errors against him without giving notice of application therefor to the party in whose favor the judgment was rendered; and if an appeal is not taken within thirty days after the appellant has served his notice, the right to a review is waived.

APPEALS from judgments of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeals were from separate judgments affirming an award by the *Industrial Commission* in favor of *Phillip Jazek.* The facts are as follows: *Tony Wojoiechowski* was a general building contractor. *Frank Lezala* was a stone mason and plastering contractor. As a subcontractor of *Tony Wojoiechowski, Frank Lezala* was doing the lathing and plastering on a building which *Wojoiechowski* had under construction. The claimant, *Phillip Jazek,* was employed by *Frank Lezala* as a lather in the performance of said contract. While performing such services on the 20th day of September, 1915, he sustained injuries, which the *Industrial Commission* found were incidental to and grew out of his employment as such lather. *Frank Lezala* carried no workmen's compensation insurance. *Tony Wojoiechowski* carried such insurance in the *Workmen's Compensation Mutual Liability Insurance Company.*

Upon the application of *Phillip Jazek* for an award of damages for the injuries he sustained, the *Industrial Commission* found that at the time of the accident the applicant was in the employ of *Frank Lezala* and *Helen Lezala;* that *Frank* and *Helen Lezala* were doing contract work under the respondent *Tony Wojoiechowski;* that said *Frank* and *Helen Lezala* did not at the time insure their compensation liability, as required by law, and had in no wise been exempted from the obligation to so insure such liability by order of the *Industrial Commission;* that *Tony Wojoiechowski* was liable for such damages; that at the time of the injury the liability of said *Tony Wojoiechowski* was insured in the *Workmen's Compensation Mutual Liability Insurance Company,* and that such company is liable for the payment of the amount awarded.

Two separate actions were brought in the circuit court for Dane county to set aside such award: one by *Tony Wojoiechowski* and the *Workmen's Compensation Mutual Liability Insurance Company,* the other by *Helen Lezala.* The circuit court rendered judgment in each of said actions affirming the award of the *Industrial Commission.* In

each of said actions *Helen Lezala* appealed from the judgment of the circuit court rendered therein. Neither *Tony Wojoiechowski* nor the *Workmen's Compensation Mutual Liability Insurance Company* appealed from such judgments or either of them.

Charles E. Hammersley of Milwaukee, for the appellant.

For the respondent *Industrial Commission* there were briefs by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

On behalf of *Tony Wojoiechowski* and the *Workmen's Compensation Mutual Liability Insurance Company* there was a brief by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* of counsel, and oral argument by *Ida E. Luick,* all of Milwaukee.

The following opinion was filed December 2, 1919:

OWEN, J. Although neither *Tony Wojoiechowski* nor the *Insurance Company* appealed from the judgments of the circuit court affirming the award, they have filed briefs, evidently upon the assumption that this court, upon the appeal of *Helen Lezala* only, will review alleged errors of the *Industrial Commission* so far as they affect the award against them. That a judgment of the circuit court is binding and conclusive upon all affected thereby until reversed upon the appeal of those claiming it to be erroneous, and that upon the appeal of one judgment defendant this court cannot disturb the judgment as to non-appealing defendants, seems to us too plain for argument or the citation of authority. *Tony Wojoiechowski* and the *Workmen's Compensation Mutual Liability Insurance Company* not having appealed from the judgments, this court cannot, upon the appeal of *Helen Lezala,* inquire into alleged errors affecting the judgments against them. Upon this appeal the court can do no more than to review the record in so far as it affects the only appealing judgment defendant, *Helen Lezala.* This

court cannot disturb the judgments in so far as they affect those who are not appealing therefrom. For this reason the contentions urged by the non-appealing judgment defendants will not be considered.

At the very outset *Helen Lezala* contends that there was no evidence justifying the finding of the *Commission* that the applicant, *Jazek,* was in her employ at the time of the accident. The *Commission* found that on the day the injury was sustained "the applicant was in the employ of the respondents *Frank Lezala* and *Helen Lezala.*" There is no finding as to the relationship existing between *Frank Lezala* and *Helen Lezala.* The record discloses that they are husband and wife, but whether the *Commission* considered them as partners, or *Frank Lezala* as the agent of *Helen Lezala,* his undisclosed principal, or what their business relationship was, does not appear. The evidence taken by the *Industrial Commission* shows that *Frank Lezala* was in fact a mason plasterer contractor and had been such for many years; that the subcontract with *Wojoiechowski* was in his name; that he had about twelve men working for him at the time, whom he hired and discharged, and, to all appearances, was the only person who had any voice or interest in the business. The only scrap of evidence in any manner connecting *Helen Lezala* with the business was the testimony of two workmen who had worked for *Frank Lezala* to the effect that they were paid by checks and that *Helen Lezala's* name was on such checks. These men testified that *Helen Lezala's* name was on top and *Frank Lezala's* was below. "She made out the check and he put his name to that—he signed below." Evidently the *Industrial Commission* considered this testimony evidence of the fact that *Helen Lezala* was in some manner, not very clear to the *Commission* itself, interested in said business with her husband.

While it is true that if in any reasonable view of the evidence it will support either directly or by fair inference

the findings made by the *Commission,* such findings are conclusive upon the court (*Oldenberg v. Industrial Comm.* 159 Wis. 333, 150 N. W. 444; *Milwaukee Western F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998; *Milwaukee v. Industrial Comm.* 160 Wis. 238, 151 N. W. 247), every finding of fact made by the *Commission* must have some substantial evidence in its support, though not necessarily the preponderance of the evidence. A finding of fact made by the *Commission* cannot be based upon mere conjecture, any more than a finding of fact made by the court. *Voelz v. Industrial Comm.* 161 Wis. 240, 242, 152 N. W. 830. The following language found in *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729, is as applicable to the findings of the *Commission* as it was to the verdict of the jury there under consideration. In that case this court said:

"To allow a jury to reach a conclusion in favor of the party on whom the burden of proof rests, by merely theorizing and conjecturing, will not do. There must at least be sufficient evidence to remove the question from the realms of mere conjecture."

Granting that her name was on the check, we can do no more than speculate as to the significance thereof. Its presence might have been due to numerous reasons. In our judgment, the inference that *Helen Lezala* was in any manner interested in the business with her husband does not fairly arise from the circumstance. This being the only evidence justifying the finding of the *Commission* that *Helen Lezala* was the employer of the applicant at the time of the injury, the finding cannot be sustained. This conclusion effectually disposes of the case so far as *Helen Lezala* is concerned, and the numerous other questions urged as grounds for a reversal of the judgment as to her need not be considered.

By the Court.—The judgments of the circuit court affirming the award of the *Industrial Commission* as to the de-

fendant *Helen Lezala* are reversed, and cause remanded with directions to set aside the award of the *Industrial Commission* as to the defendant *Helen Lezala.* No costs allowed.

The following opinion was filed February 10, 1920:

OWEN, J. Upon a motion for rehearing, made by the judgment defendants *Tony Wojoiechowski* and the *Insurance Company,* it is urged that they are entitled to a review of alleged errors affecting the judgment as to them, by virtue of a notice, which it is claimed was regularly and timely served and filed under the provisions of sec. 3049*a,* Stats., that upon the hearing of the appeals in this court they would ask for a review of certain specified errors. It is suggested that this court has overlooked this notice, and our attention is pertinently called to the fact that it is on file here.

The original opinion was written upon the assumption that no such notice had been filed. This assumption was indulged by reason of the unchallenged statement of the attorney general to that effect made in his main as well as supplemental brief and upon the oral argument. One of the appropriate functions of a brief is to direct the attention of the court to pertinent matters appearing in the record. In the absence of any indication on the part of the moving defendants that such notice was on file and that it was relied upon to entitle them to a review of errors affecting the judgment as to them, a search of the record for the discovery of such a document on the part of this court is not to be expected.

It now appears that on the 4th day of November, the very day the case was argued, a notice conforming to the requirements of sec. 3049*a* was filed with the clerk. The question is therefore presented of whether the moving defendants, by virtue of such notice, were entitled to a re-

view of errors affecting the judgment as to them and a reversal of the judgment in case such errors were found to be prejudicial. Sec. 3049*a* reads:

"In case one of a number of parties jointly or severally bound by the same judgment appeals therefrom, he shall serve his notice of appeal on all parties who are bound with him by the judgment, and said parties shall thereupon within thirty days after such service, unless the time be extended by the trial court for cause shown, take and perfect their own appeals or be deemed to have waived their right to appeal. . . . In any case the respondent may have a review of the rulings of which he complains by serving upon the appellant any time before the case is set down for hearing in the supreme court a notice stating in what respect he asks for a review, reversal or modification of any part of the judgment or order appealed from."

It is conceded that the notice was served only upon the attorney for *Helen Lezala,* the appealing defendant. It was not served upon the *Industrial Commission* nor upon the claimant. It is said, however, that the statute requires that it be served only upon the appellant, and this they did. Granting that this complied with the strict letter of the statute, it certainly did not comply with its spirit. It is not the purpose of the statute to permit one who is bound jointly with another by a judgment, upon the appeal of such other, to secure a reversal of such judgment as to him by the service of a notice merely upon the one appealing. The one appealing does not necessarily have an adverse interest in the question as to whether his co-judgment defendant is also entitled to a reversal. The one in whose favor the judgment is rendered is the one interested, and the statute will not be construed so as to entitle a co-judgment defendant to a review of alleged errors without giving notice of application therefor to the party in whose favor the judgment is rendered. However, that this provision of sec. 3049*a* does not apply to a situation of this kind at all is plainly revealed by the first sentence thereof, which pro-

vides that where "one of a number of parties jointly or severally bound by the same judgment appeals therefrom, he shall serve his notice of appeal on all parties who are bound with him by the judgment, and said parties shall thereupon within thirty days after such service, unless the time be extended by the trial court for cause shown, take and perfect their own appeals or be deemed to have waived their right to appeal."

In this case it was incumbent upon the moving defendants, by the express provisions of the statute, to take their appeal within thirty days after their co-judgment defendant appealed. Not having done so, they waived their right to appeal, and they cannot accomplish the same thing by service of the notice provided for in the closing sentence of the section. The purpose of the latter provision is plain. It is to enable a party who is adversely interested in an appeal, generally the respondent, to secure a review of alleged errors prejudicially affecting him, by the giving of this notice. It was not the purpose of the statute to authorize a review under circumstances here presented. Nor is such notice efficient to procure a reversal of the judgment in the absence of an appeal therefrom.

By the Court.—Motion for rehearing denied, without costs.

UNITED STATES NATIONAL BANK, Respondent, vs. LAKE SUPERIOR TERMINAL & TRANSFER RAILWAY COMPANY, Appellant.

November 4, 1919—February 10, 1920.

Taxation: Special assessment tax certificate: Purchase by county: Action by assignee of county: Limitation of actions.

Where lands are sold for the purpose of enforcing special assessment liens and are bid in by the county, the certificates of sale when issued are not the property of the county but of the holders of the special assessment certificates; the county being merely a trustee and not an owner within the meaning

of sec. 1182, Stats., which provides a limitation of six years from the day of sale upon all tax certificates except those issued to "and owned by" counties or municipal corporations.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

Foreclosure of a certificate of tax sale covering a parcel of land of 5.90 acres owned by the defendant in the city of Superior. The certificate in question was issued to Douglas county May 19, 1908, on sale of the land by the county treasurer of that county on account of an unpaid special assessment of $1,689 for the paving of a street in front of part of the parcel sold. The paving was done in 1907 and a certificate issued to the contractors therefor September 25, 1907, which certificate was afterward assigned to the plaintiff. The plaintiff brought a personal action December 6, 1913, against the defendant to collect the amount of said contractors' certificate as well as the amount of another certificate issued at the same time against another parcel of land owned by defendant. This action resulted in a judgment of dismissal of the complaint on the ground that the same was barred by sec. 1183, Stats., which provides that no action either at law or in equity shall be maintained on a special improvement certificate of this nature after six years from its date. This judgment was affirmed by this court in 160 Wis. 669, 152 N. W. 459. On the 21st of July, 1915, the county assigned and transferred the tax-sale certificate sought to be foreclosed in this action to the plaintiff on payment of the fees and charges thereon, amounting to forty-six cents, and this action was immediately commenced.

The circuit court held the certificate valid and rendered judgment of foreclosure and sale of the premises, from which the defendant appeals.

J. A. Murphy of Superior, for the appellant.

For the respondent there was a brief by *Grace, Hudnall & Fridley* of Superior, and oral argument by *Geo. B. Hudnall.*

The following opinion was filed December 2, 1919:

WINSLOW, C. J. It is conceded that all remedy by personal action on the contractors' certificate is barred by the provision of sec. 1183, Stats., and that this fact is conclusively determined by the judgment in the former action. The respondent claims, however, that this fact does not in any way affect the lien of the tax-sale certificate, and in support of this position relies upon the analogy of the cases which hold that although the six-year statute of limitations may have run upon a note, still an action may be thereafter maintained to foreclose the lien of a mortgage given to secure the note, because the mortgage is not barred until the lapse of twenty years after its execution. *Duecker v. Goeres,* 104 Wis. 29, 80 N. W. 91.

We do not decide whether that principle is applicable to the present case nor do we intimate any opinion upon the question, but we shall assume for the purposes of the action that it is.

Upon this assumption the question is, Has the statute of limitations run upon the tax certificate? Sec. 1182, Stats., provides a limitation of six years from the day of sale upon all tax certificates except upon the tax certificates issued to *and owned by* counties or municipal corporations or their assigns, as to which certificates the limitation does not begin to run until six years from the date of the assignment of the certificate by the county or municipal corporation, not exceeding, however, fifteen years from the date of sale.

The certificate in question was issued to the county, but was it *owned by* the county within the meaning of the law? The word "own" has not always the same meaning. It is often used to characterize an interest less than absolute ownership. *Merrill R. & L. Co. v. Merrill,* 119 Wis. 249, 96 N. W. 686; *State ex rel. Marshall & Ilsley Bank v. Leuch,* 155 Wis. 500, 144 N. W. 1122. Where there is doubt as to the sense in which the word is used the object sought by the statute is the most important consideration.

The object sought in exempting counties from the six-year statute as to all certificates held and owned by them undoubtedly was to protect the public revenues and treasury from danger of depletion by the early running of the statute. Was it intended to protect contractors? We think not. This court has very emphatically held that "in case lands, sold for the purpose of enforcing assessment liens, are bid in by the county, the certificates of sale, when issued, are not the property of the county, but of the holders of the special assessment certificates," the county being merely a trustee for such holders and bound to turn over the tax certificates to such holders on surrender by them of their special assessment certificates. *State ex rel. Donnelly v. Hobe,* 106 Wis. 411 (82 N. W. 336) at p. 422.

We see no flaw in the reasoning on which that case was founded. It follows that, while the county nominally held the tax certificate in question, it was in fact the property of the holder of the special assessment certificate and was not owned by the county. The infinitesimal interest in the way of fees and charges which the county was entitled to receive before it assigned the tax certificate to the contractor or his assigns cannot seriously be considered as vesting any ownership thereof in the county.

The respondent argues that because by sec. 926—137, Stats., it is provided that the contractor or his assigns, after receiving the tax certificate from the county and "within the time limited by law in the case of tax certificates of sale, for other taxes," may demand a tax deed, and because the time limited by law in case of lands bid in by the county for other taxes does not expire till six years from the assignment of the tax certificate by the county, *ergo,* it must be held that the time does not expire in case of special assessment certificates until six years from the assignment of the tax certificate.

This argument ignores the fact that all certificates are barred by sec. 1182 at the expiration of six years from the

date of issue except such as have been issued to and are *owned by* the county. We discover no other exceptions to the six-year limitation; and, having reached the conclusion that the certificate in question was never owned by the county within the meaning of the law, we conclude that the present action was barred by the statute.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

The respondent moved for a rehearing.

In support of the motion there was a brief by *Grace, Hudnall & Fridley* of Superior.

In opposition thereto there was a brief by *J. A. Murphy* and *H. G. Pickering,* both of Superior.

The motion was denied, with $25 costs, on February 10, 1920.

GUARDIANSHIP OF BARE: CRONE, Appellant, vs. GOETSCH, Respondent.

SAME, Respondent, vs. SAME, Appellant.

November 5, 1919—February 10, 1920.

Parent and child: Right to custody of child as affected by statute: Natural rights of mother: Payment of compensation by mother as condition for return of child.

1. Whatever right to the custody of a child the parent has by legislative provisions similar to those of secs. 3964, 3965, Stats., or under the rules of the common law, must stand aside if a recognition of such right would materially interfere with the paramount right of the child to have its welfare considered and conserved by the court.
2. In a proceeding to vacate a guardianship over a five-year-old infant, an order restoring the custody of the child to the mother is proper upon a finding that the mother and her husband can furnish a suitable home and care for the child, although it is also found that the defendant, who had brought up the child as his own since it was three years old, is likewise able to furnish such home and care.

3. In such case it was error to make the payment of compensation for the care of the child a condition for its return to the mother.

APPEALS from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed on appeal of Joseph Goetsch; reversed on appeal of Mattie Bare Crone.*

Gladys May Bare was born October 8, 1912, and in the same month placed with a Mrs. Snover at Mukwonago, Waukesha county, for care by the mother, *Mattie Bare,* now *Mrs. Crone,* respondent and appellant. She was to pay at the rate of $4 per week for such care, and subsequently, as she claims, at the rate of $2 per week, and did pay on account from time to time. In July, 1915, Mrs. Snover moved to Montana and left Gladys with her daughter, Florence, and her husband, *Joseph Goetsch,* who is also appellant and respondent herein. Shortly after Mrs. Snover left, Mrs. Goetsch and the mother had a conversation about the future of the child. A dispute arises under the testimony as to whether it was agreed that the mother was then willing to relinquish for all time her right to the child and permit Mr. and Mrs. Goetsch to rear it as their own, or whether the arrangement was for its care until such period as the mother could take the child, and providing that in event of the mother's death the child might then belong to the Goetsches.

In February, 1917, at the suggestion of Mrs. Snover *Mattie Bare* went to Montana and worked for a family there. In September, 1917, she married Ralph Crone of Montana, who was fully informed of the existence of said child and the circumstances surrounding its birth. Shortly after marriage Mr. and *Mrs. Crone* came to Wisconsin and have lived here since.

In February, 1918, a petition was made to the county court of Waukesha county by *Joseph Goetsch* for his appointment as guardian over the infant, and on March 7th letters of guardianship were issued to him. No notice, how-

ever, of this proceeding was served during the pendency thereof upon the mother. In September of the same year the Crones moved to Waukesha and then commenced proceedings to vacate said guardianship and have the care and custody of the said child restored to the mother. The guardianship proceedings were set aside by the county court and an appeal taken from such order to the circuit court. Considerable testimony was taken in that court and the proceedings treated as though on a writ of *habeas corpus.* The trial court found, among other things, as follows:

"That on July 3, 1915, the said child was placed with *Joseph Goetsch* with the knowledge and consent of the mother; that *Joseph Goetsch* received said child and took her into his home under the belief, formed in good faith from a prior conversation with the mother, that he and his wife should have and rear said child as their own.

"That said *Joseph Goetsch* and his wife have cared for the child since such time, provided for it a good home with the kind and character of nursing in the home which parents accord to their own children; that he and his wife are greatly attached to said child and the child to them and that they are able and willing to provide a good home for her, to bring her up in a proper manner and to give her a suitable and proper rearing and education.

"That the mother permitted the child to live in ignorance of the fact that she was her mother and to live in the belief that *Joseph Goetsch* and his wife were her parents.

"That the mother paid the sum of $70 to *Joseph Goetsch* towards the care of said child since July 15, 1915.

"That the mother and her husband, Ralph Crone, now reside at Waukesha, where they are ready, willing, and able to make and maintain a good and suitable home for the child; that the petitioner 'is in all respects a fit and proper person to have the care and custody of her daughter; that she is an upright, sober, and capable mother, competent to rear and educate her daughter; that with the assistance of her husband, who has evidenced his willingness to make a home and provide for the child, the mother is now able to furnish a good and suitable home for the child and provide for her education.'

"That upon learning of the guardianship proceedings the mother made demand for the release of her child and its

return to her and offered to pay an amount which she claimed was the proper amount due for the board, care, and lodging furnished the child; that *Mr. Goetsch* disputed the amount as stated by petitioner and refused the demand in all things.

"That the reasonable value of the care, maintenance, and support provided by *Joseph Goetsch* for the infant is at the rate of $275 per year, amounting to $825, upon which has been paid the sum of $70, leaving a balance of $755.

"That the welfare of the child does not require that her custody be changed from *Joseph Goetsch* to the petitioner; but because of the paramount legal right of the parent, where both parties are competent and suitable, the petitioner is entitled to have the custody of her daughter, Gladys May Bare. However, equity and good conscience require that, before the custody of the child be changed, the petitioner be required to pay the said sum of $755 to the said *Joseph Goetsch.*"

In the decision of the trial court he said, among other things:

"This matter has not been an easy one to decide. The welfare of this little girl, bright and lovable and somewhat nervous, is of such great importance that it has been extremely difficult to reach a conclusion. If it were left to me to designate a custodian, without being obliged to give consideration to the legal rights of the mother, I would not hesitate to say that the child should remain where it is. I am certain that a good home and the best of training would always be provided. While I am convinced that the mother will likewise provide suitable care and education, there is absent the actual experience of the past to support one's judgment. However, the evidence is not sufficient, in my judgment, to warrant any reasonable apprehension that it would result in harm to the child or in prejudice to her interest or welfare if her custody be transferred to the mother."

Upon the findings the court directed that the child be delivered to the mother, but that before such order or judgment be executed and before *Joseph Goetsch* be required to surrender possession and custody of the child, the mother,

Mattie Bare Crone, be required to pay the sum of $755 as just and reasonable compensation for the care of said child and expenses incurred therein.

From so much of the order or judgment as directed the delivery of said child, Gladys May Bare, to her mother, *Mattie Bare Crone,* the said *Joseph Goetsch* has appealed; and from so much of the said order or judgment as directed that the sum of $755 be paid by *Mattie Bare Crone* for the use of *Joseph Goetsch* before said *Goetsch* be required to deliver the child to its mother the said *Mattie Bare Crone* has appealed.

For *Mattie Bare Crone* there were briefs by *Frame & Blackstone* of Waukesha, and oral argument by *H. J. Frame.*

For *Joseph Goetsch* there was a brief by *Lockney & Lowry* of Waukesha, attorneys, and *W. P. Collins* of Boulder, Colorado, of counsel, and oral argument by *Mr. Henry Lockney* and *Mr. Collins.*

The following opinion was filed December 2, 1919:

ESCHWEILER, J. No complaint is made against, and under the record none could well be raised to, the finding of the court that Mr. and Mrs. Goetsch, after receiving the child in July, 1915, gave it a good and suitable home, treated it with the same care, attention, and tender regard as though it were their own, and have become and are very fondly attached to the child, as the child is to them.

Joseph Goetsch on this appeal insists that the testimony does not warrant the conclusion arrived at by the trial court that the mother and her husband are suitable and proper persons to have the care, custody, and bringing up of the child. No useful purpose would be served by commenting upon the evidence in the record on this question. It satisfies us that the finding made by the court below in this regard cannot be disturbed and warrants the conclusion reached by the trial court in that the mother is now a suit-

able person to have and is entitled to the care and custody of her own child.

Whatever right to the custody of a child is recognized to be in the father or mother by such legislative provisions as are found in secs. 3964 and 3965, Stats., or under the rules of the common law, must stand aside if a recognition of such a right in a parent would materially interfere with the paramount right of the child, the being most concerned, to have its welfare considered and conserved by the court. This has been so often declared that it needs no further discussion. *Jensen v. Jensen,* 168 Wis. 502, 504, 170 N. W. 735; *State ex rel. Strachota v. Franz,* 166 Wis. 32, 34, 163 N. W. 191.

That such a rule has always been the key used to solve the troublesome and delicate problems arising in conflicts over the possession of a child may be seen in such cases as *Sheers v. Stein,* 75 Wis. 44, 43 N. W. 728; *Johnston v. Johnston,* 89 Wis. 416, 62 N. W. 181; *Markwell v. Pereles,* 95 Wis. 406, 69 N. W. 798; *McChesney's Appeal,* 106 Wis. 315, 82 N. W. 149; *Lemmin v. Lorfeld,* 107 Wis. 264, 83 N. W. 359; *In re Stittgen,* 110 Wis. 625, 632, 86 N. W. 653.

Such consideration for the welfare of the child, however, does not mean that its custody may be auctioned off to him who will make the highest bid in the shape of greater financial standing, more comfortable surroundings, or larger opportunities for the future. If a good and suitable home is ready and offered by one attached by the ties of nature to the child, those ties can neither be disregarded nor severed because some one better situated is able to offer more. 29 Cyc. 1590, 1591; *Buchanan v. Buchanan,* 93 Kan. 613, 144 Pac. 840.

The court below, therefore, having reached the conclusion that the mother and her husband can now furnish a suitable home and proper care for this child, very properly

determined that the mother, rather than those not related to the child, should have its custody.

Upon the other provision of this judgment we can find no warrant for any determination by the court in this proceeding of anything in the nature of money compensation to *Mr. Goetsch* for the care of the infant, much less so for any direction that the change in the custody of the child shall be conditional upon the payment of any such sum. No such issue was framed by anything suggested in the petition or pleadings herein, nor was it a necessary or proper one for determination by the court below. So much, therefore, in the judgment or order of the court below as attempts to fix any amount due from the mother of the child to the Goetsches must be vacated and set aside.

Having rightly determined that the custody of this child belongs to the mother, the body of such child cannot be held as security for the payment of money. A child can be neither bartered nor pledged. Although the ministrations of the Goetsches to this little child have been of the best and tenderest, and although the mutual affections that have grown up between them and this child are very strong and deserving of the highest praise, yet such can never ripen into anything in the nature of a lien upon a human being. The control by a creditor over the custody of the person of a debtor as security for the debt has long since been abolished. It never has existed and certainly does not now exist over the body of a child for any monetary claim. The scales in this case having been properly found to be inclined to the side of the mother as to the custody of this child, they cannot be tipped to the opposite by loading the other side with any monetary consideration.

By the Court.—So much of the judgment as awards the custody of the child Gladys May Bare to *Mattie Bare Crone* is affirmed. So much thereof as determines that there is due any amount for the care of the child and as requires

the payment to *Joseph Goetsch* of the sum of $755 as a condition for the return of said child is vacated and set aside. *Mattie Bare Crone* to have her costs on this appeal.

Joseph Goetsch moved for a rehearing.

In support of the motion there was a brief by *Lockney & Lowry* of Waukesha, attorneys, and *Arthur H. Koenitzer* of Milwaukee, of counsel.

In opposition thereto there was a brief by *Frame & Blackstone* of Waukesha.

The motion was denied, with $25 costs, on February 10, 1920.

FELZ, Appellant, vs. ESTATE OF FELZ, Respondent.

November 7, 1919—February 10, 1920.

Executors: Claims against deceased persons: Claim based on services rendered widow's husband: Wills: Agreement to devise: Termination: Question for jury: Deeds: Oral conditions: Trusts: Trial: Changing answers in special verdict.

1. A claim founded upon services rendered to decedent's husband, also deceased, is unenforceable against the widow's estate where the husband's estate has been fully administered long prior to the widow's death.
2. Where a deed from a husband to his wife is absolute in form, an oral condition that she reconvey to plaintiff is void under sec. 2302, Stats., and parol evidence is not admissible to show that a trust was created.
3. In an action on a claim against a decedent's estate based upon an alleged contract whereby plaintiff was to take care of decedent for life upon an understanding that her property was, after her death, to belong to plaintiff, evidence that plaintiff was absent from the farm upon which decedent resided for more than four or five years is sufficient to show a termination of such agreement.
4. Oral testimony as to the contents of a letter claimed to have been received by the plaintiff from the deceased and since lost, is inadmissible to prove the contract, as the sending and receipt of the letter was a transaction and the contents a communication with a deceased person under sec. 4069, Stats.

5. The evidence in this case is *held* to make it a question for the jury as to whether plaintiff had an agreement with the decedent such as he alleges.
6. Where two witnesses testify positively to the existence of a promise by the deceased to leave her property to the plaintiff, the trial court was not justified in changing answers in the special verdict relating to the existence of such promise.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to recover the value of services rendered by plaintiff to George Felz, Sr., deceased, and to his widow, Anna Felz, deceased. Claim was filed in the county court of Jackson county against the estate of Anna Felz, who died in March, 1916, and it was therein sought to recover for services rendered her husband, George Felz, Sr., who died in November, 1896, on the theory that Anna Felz had received a deed of her husband's lands with the oral understanding that she was to give them to plaintiff upon her death. The county court wholly disallowed the claim and the plaintiff appealed to the circuit court. That court refused to submit to the jury the claim of plaintiff in so far as it was founded upon services rendered to George Felz, Sr., whose estate was administered shortly after his death in 1896 and entirely closed long prior to the death of Anna Felz.

As to services rendered Anna Felz, plaintiff claimed under two separate agreements: one made just after the death of George Felz, Sr., in 1896, and another made in a letter from Anna Felz sent to plaintiff while he was in Minneapolis some time between 1899 and 1903, and reaffirmed after his return to the farm. Both these alleged agreements were to the effect that if he would stay and work the farm and take care of Anna till she died she would leave him all her property. The jury returned the following special verdict:

"(1) Did the plaintiff and his aunt, Anna Felz, after the death of George Felz, Sr., enter into a contract by the

terms of which plaintiff agreed to stay with his aunt as long as she lived and render services to her and in consideration thereof she promised to give plaintiff all her property real and personal at her death? *A.* Yes.

"(2) Did the plaintiff and his aunt, about the time he returned from Minneapolis, enter into a contract by the terms of which plaintiff agreed to stay with his aunt as long as she lived and render services to her and in consideration thereof she promised to give to plaintiff all her property at her death? *A.* Yes.

"(3) Or, at and after the time plaintiff returned from Minneapolis, did he stay with his aunt without any contract or agreement with her that he should be compensated for his services by his aunt giving him her property at her death, but with an agreement to work her place on shares? *A.* No.

"(4) If you shall have answered questions 1 or 2 'Yes' and found there was such a contract for compensation as stated therein, then answer the fourth question. But if you answer the third question 'Yes' you need not answer this question: How much was the value of the services of plaintiff for his aunt from and after the time he returned from Minneapolis to live with her and until her death over and above all payments or things of value received by plaintiff from his said aunt? *A.* $9,572.80."

Upon motions made after verdict the court changed the answers to questions 1 and 2 from "Yes" to "No," and the answer to question 3 from "No" to "Yes," and the answer to question 4 from "$9,572,80" to "$4,500," and entered judgment dismissing the complaint upon the merits, with costs. Plaintiff appealed.

W. H. Frawley of Eau Claire, for the appellant.

For the respondent there was a brief by *Perry & Perry* and *E. S. Jedney,* all of Black River Falls, and *P. M. Beach* of Eau Claire, and oral argument by *Mr. H. M. Perry* and *Mr. Beach.*

The following opinion was filed December 2, 1919:

VINJE, J. The court properly refused to submit to the jury any claim founded upon services rendered to George

Felz, Sr., because his estate was fully administered upon shortly after his death in 1896 and any valid claim against his estate could not be enforced against the estate of his widow dying years afterward. If the claim is sought to be sustained on the ground that Anna Felz received a deed of her husband's lands upon an oral condition that she should convey the same to plaintiff, such condition was void under sec. 2302, Stats. 1917, because the deed to her was absolute in form. Parol evidence was not admissible to show that a trust was created. *Illinois S. Co. v. Konkel,* 146 Wis. 556, 131 N. W. 842.

It is undisputed that plaintiff was away from the farm for at least a period of not less than four or five years and perhaps for seven or eight years at one time previous to his return from Minneapolis, the date of which he is unable to fix definitely but which he thinks was in 1903 or 1904. Such absence must be held to have terminated any agreement he may have entered into with Anna Felz shortly after the death of her husband in 1896, and it is clear that if he can recover at all it must be by reason of an agreement made with her after his return from Minneapolis.

Relative to the issue submitted in the second question, the plaintiff was permitted to give oral testimony of the contents of a letter he claimed he had received from *Anna Felz* while he was in Minneapolis, and which letter he said was lost, to the effect that therein she stated that if he would come back and stay with her as long as she lived she would give him her property. The reception of such evidence was error, as the trial judge later properly concluded in his opinion in the case. *Jackman v. Inman,* 137 Wis. 30, 118 N. W. 189, and cases cited; *Tolsma v. Tolsma's Estate,* 183 Mich. 314, 149 N. W. 1050. The sending and receipt of the letter was a transaction between plaintiff and the deceased. Its contents constituted communication between them. The letter if genuine and produced would have been admissible in evidence, but to permit oral testimony of its contents by plaintiff would be to emasculate sec.

4069, Stats., and would open the door wide for oral proof of any alleged letter from, or written contract with, a deceased in his lifetime and since lost. There would be no security from fraud or self-interest, for a lost written agreement could always be claimed. It is better that the loss of such a writing fall on him who sustains it than that the door which the statute closes should be permitted to be opened in this way.

The error in receiving parol proof of the contents of the letter was prejudicial error because it was the most cogent evidence upon which an affirmative answer to question 2 could be based, and the jury must have given it weight in arriving at their conclusion. Without such evidence a verdict could not be directed for either party, and therefore a question for the jury remained which they never passed upon freed from the material incompetent evidence. *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Jackman v. Inman,* 134 Wis. 297, 114 N. W. 489.

Exclusive of the testimony of the contents of the letter, is there credible evidence sufficient to sustain an affirmative answer to question 2? The trial court thought not and therefore changed the answer to that question. In so doing it is apparent he was influenced by the fact that there was very persuasive evidence that during the latter years of Mrs. Felz's life plaintiff received a part of the proceeds of the crop of the farm, and therefore he must have been renting it on shares, and such an arrangement was inconsistent with his claim that he was to work the farm and take care of his aunt till she died in consideration of her giving him all her property. It is quite clear that after her death plaintiff received from the administrator one half of the crop, hogs, and veal then on the farm.

Plaintiff, who is the nephew of George Felz, Sr., came from Germany in 1882, then only about fourteen years of age, to live with his uncle and aunt. At her death in 1916 he was unmarried and about forty-eight years of age. It does

not seem unreasonable that, in view of his age and needs for money over and above that absolutely necessary for his food, shelter, and clothing, his aunt in her declining years might be willing to give him one half the crop even though she recognized the agreement he claims she made with him. The two are not necessarily inconsistent, and in the event he had such an agreement as he claimed, his share of the crop could be regarded as payment *pro tanto* for services rendered and would reduce his compensation by that much. That being so, we are of the opinion that a jury must pass upon the question whether or not he had such an agreement as he claims with his aunt after he returned from Minneapolis. There is nothing in the record to substantiate any prior claims for service. If he can prove a contract such as he claims, then it would support a judgment for the reasonable value of his services, for it would rebut the presumption of gratuitous services (*Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229), and the law would substitute for the void promise to devise real estate for such services the valid promise to pay their reasonable value, as held in *Laughnan v. Estate of Laughnan,* 165 Wis. 348, 162 N. W. 169.

Among other evidence tending to support the claim that after plaintiff returned from Minneapolis the deceased agreed to give him her property if he would work the farm and take care of her till her death, is that of John Waterpuhl, who testified that about two years before Anna Felz died he heard her say to *George* that if *George* would stay with her all her living days the property belonged to him, and that he said he would stay; also that of Frank Matysik, who testified that some time after the death of George Felz, Sr., the farm was rented, "Then when the renters moved out *George* went on to the farm with her and he stayed with her until she died," though part of the farm was rented after that. She said to *George,* "Now, *George,* if you will stay with me as long as I live everything I got is yours, if

you stay with me as long as I live;" and he said "Auntie, I will stay." *George* says, "When I came back from Minneapolis the renters were there yet. We stayed at Matysik." So this conversation testified to by the witness must have taken place after *George* came back from Minneapolis and while he and his aunt stayed at Matysik's house. In view of this positive evidence by two witnesses of a promise by Anna Felz to leave *George* all her property if he would stay with her till she died, we think the trial court was not justified in changing the answer to question 2 from "Yes" to "No" and the answer to question 3 from "No" to "Yes." The result is that the judgment must be reversed and the case sent back for a new trial on the question of whether, after *George* returned from Minneapolis, Anna Felz promised to leave him all her property if he would stay with her till she died, and, if she did, what was the reasonable value of the services rendered her after that over and above any payments in cash or crops he may have received therefor.

By the Court.—Judgment reversed, and cause remanded for a new trial.

A motion for a rehearing was denied, with $25 costs, on February 10, 1920.

CHAUDOIR, Appellant, vs. WITT and others, Respondents.

February 4—March 4, 1919.
October 11, 1919—February 10, 1920.

Deeds: Delivery to grantee on condition: Deed as testamentary document.

1. A finding by the trial court that a deed executed by a grantor to a third person, who immediately deeded to the grantor's wife, was made with the intention of conveying the property described in the deeds, is sustained where the evidence discloses that the grantor, being ill, wanted the conveyance made because he might die, and both deeds were delivered by the third person to the wife, although it appears that the deeds were not to be recorded until after the grantor's death.

2. Neither the recovery of the grantor and his use of the property as his own until he died many years later, nor the belief of both husband and wife that the title was in the husband, changes the legal effect of the transaction.
3. The delivery of a deed in escrow or upon condition cannot be made to the grantee himself, and if so made it at once becomes absolute and divested of the supposed condition.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an equitable action to set aside two quitclaim deeds on the ground that they were in fact testamentary documents and had never been delivered so as to become effective as deeds. The action was originally brought by one Rose Chaudoir, and upon her death revived in the name of her husband, the present plaintiff, as the executor and sole devisee under her will. Rose Chaudoir was the granddaughter of one Fred Witt and Lina Witt, his wife, both deceased, being the only child and heir at law of their deceased son, Fred Witt, Jr. Fred Witt, Sr., died intestate January 25, 1915, and left as his heirs at law his three surviving children, viz. *John Witt, Herman Witt,* and *Lina (Witt) Bukowsky,* and Rose Chaudoir, his said grandchild. Lina Witt died January 14, 1916, testate, devising the real estate involved in this action and described in the deeds in question to the defendants, the three surviving children above named. Lina Witt had no title to the real estate in question unless the two deeds attacked in this action were valid deeds. If they were valid the defendants own the property under the will; if they were not valid the plaintiff's testatrix owned a one-fourth interest in the property as the representative of her deceased father's rights.

The material facts are not seriously in dispute. Prior to the year 1871 Fred Witt, Sr., owned lots 16 and 17 in a certain block and subdivision in the city of Milwaukee. In June, 1871, he sold lot 17, but retained lot 16 (the lot in question here), upon which were located a store building in which he conducted a grocery store, a dwelling house in

which he and his family lived, and a pump shop. In November, 1879, Fred Witt, Sr., became seriously ill and sent for Frank Suelflow, a real-estate and insurance man with whom he did business, to draw some papers for him. Suelflow took one Damkoehler, a notary, with him, and they went to Witt's house. While there a quitclaim deed of lot 16 running to Suelflow was signed, witnessed, and acknowledged by Fred and Lina Witt, and a deed from Suelflow and wife to Lina Witt was drawn. This latter deed was taken by Suelflow to his own home or office and executed with due formalities, and then both deeds were taken by Suelflow to Witt's house and left with Lina Witt. These are the deeds attacked in this action. No consideration was given for either deed. Suelflow and Damkoehler were both examined on the trial and were the only witnesses giving any direct evidence as to the transaction. Neither of them pretended to remember the conversation that took place, but each stated in general terms his recollection of the matter. Damkoehler testified that, as he understood it, Witt was making the deeds because he wanted his wife to have the property in case he died at that time. Suelflow was examined more at length and stated that Witt summoned him to come to the house; he (Witt) wanted papers made assigning it (the property) over to his wife in case he died; that it was understood that the deed should not be put on record till after Witt's death; that Witt told him he wanted to deed his property over to his wife "because he was sick and might die, and in case he died it would be assigned over to his wife;" that the property should not be hers until after he was dead; that as long as he lived it was understood that the property was to be his; that he gave both deeds to Mrs. Witt because Mr. Witt was in bed; that he gave the quitclaim deed signed by himself to Mrs. Witt on the understanding that she should put it on record after Witt was dead, and for the purpose of conveying the property to her.

The defendant *Lina Bukowsky* testified that she remembered the occasion; that she was eight or nine years old at the time; that father was "pretty bad sick;" that both her father and her mother afterwards talked about the matter and said they had papers made at that time "because he was so sick; that he had papers made in case he would die it belong to her."

Fred Witt recovered from his illness, and apparently everything went along in the business and family as before until his death in 1915. In 1886 he repurchased lot 17 and the deed to himself was immediately recorded. Lot 16 was assessed in the name of Fred Witt year by year until after Mrs. Witt's death. The buildings were insured during the whole time in the name of Fred Witt as owner. In 1886 a mortgage on lot 16 for $600 was executed by him and his wife in which Fred Witt covenanted that he had good title to the lot and would warrant and defend the same. It appears also that Fred Witt made repairs and improvements on the buildings to the extent of some hundreds of dollars, paying for the same from his own money or from money borrowed by him for the purpose, and that he collected the rents accruing from those parts of the buildings which were rented. About six weeks before Fred Witt's death he said to a friend that he had made his will and left his property to his wife and that he made the will about thirty years ago or so. The two deeds attacked were preserved at the residence, and after Mr. Witt's death were found among his papers, which had been kept in a bureau drawer in a bedroom of the house. Mrs. Witt called in a business man, one Boorz, to look over the papers left by her husband and advise her what to do, and in the course of his examination the two deeds were found. They were subsequently recorded by a member of the Suelflow firm. Lina Witt on March 23, 1915, made and executed in due form a deed of the property to her children, the three defendants in this

action, but never delivered it. This deed was found by *Lina Bukowsky,* after her mother's death, among her papers and immediately recorded.

The trial court found that the two deeds attacked were both delivered with intent to pass title, but that the deed made by Lina Witt in March, 1915, was never delivered; and concluded that the defendants were the owners in fee of the property in question as devisees under the will of Lina Witt, and entered judgment dismissing the complaint on the merits, from which judgment the plaintiff appeals.

Arnold C. Otto of Milwaukee, for the appellant.

Henry E. Foelske of Milwaukee, for the respondents.

The following opinion was filed March 4, 1919:

WINSLOW, C. J. There is but one serious question in this case, and that is the question whether the finding of the trial court to the effect that the deeds in question were delivered with intent to presently convey the property is sustained by the evidence, and we approach this question mindful of the principle that the finding must be sustained unless it be against the clear preponderance of the evidence.

The legal principles applicable to the case are comparatively simple and free from doubt and may be briefly recapitulated as follows: A deed is of no effect until delivered. The delivery may be by actual tradition of the document to the grantee or to some third person for him, or it may be by other acts deemed in law to amount to the same thing; but in either case there must be the intent presently to pass the title. The manual possession of the instrument by the grantee creates a presumption of delivery, which, however, may be overcome by evidence showing that the possession came about without intent to pass title but to accomplish some other purpose. A secret intent on the part of the grantor that title shall not pass when the deed is manually given into the possession of the grantee will not prevent the passing of title, but if the intent on both sides

be that the deed shall serve merely as a testamentary document and is to remain subject to the grantor's control and not take effect during his lifetime, it will not pass title even though physically handed to the grantee. *Prutsman v. Baker,* 30 Wis. 644; *Rogers v. Rogers,* 53 Wis. 36, 10 N. W. 2; *Curry v. Colburn,* 99 Wis. 319, 74 N. W. 778; *Butts v. Richards,* 152 Wis. 318, 140 N. W. 1; *Zimmerman v. Zimmerman,* 165 Wis. 146, 161 N. W. 369; *Wilson v. Wilson,* 158 Ill. 567, 41 N. E. 1007; *Oswald v. Caldwell,* 225 Ill. 224, 80 N. E. 131; *Roup v. Roup,* 136 Mich. 385, 99 N. W. 389; *Rountree v. Smith,* 152 Ill. 493, 38 N. E. 680.

Careful study of the evidence in this case convinces us that the idea of all the parties to the transaction was that the deeds were to operate as testamentary documents only and were to have no effect during Witt's lifetime. It would serve no good purpose to repeat the evidence in this opinion; it will be found quite fully set forth in the statement of facts. It is sufficient now to say that not only the direct evidence, but all of the significant circumstances surrounding the transaction and occurring since that time, confirm the statement of Mr. Suelflow, namely, that the property was not to be Mrs. Witt's until after he (Mr. Witt) was dead, and was to be his as long as he lived. We are convinced that the findings to the effect that the deeds were delivered with the intention of presently conveying the property are contrary to the clear preponderance of the evidence.

The respondents challenge the correctness of the court's finding to the effect that the deed executed March 23, 1916, by Carolina Witt, naming the defendants as grantees, was never delivered to them. In the view we have taken of the case this question becomes immaterial, but in any event we see no reason to doubt the correctness of the finding. Some questions are raised by the respondents relating to the practice adopted in the proceedings for revival of the action, but

we have been unable to see that the rulings were erroneous and it does not seem necessary to state the contention at length.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff in accordance with this opinion.

The respondents moved for a rehearing.

In support of the motion there were briefs by *Henry E. Foelske,* attorney for respondents, and *Christian Doerfler,* of counsel, both of Milwaukee.

In opposition thereto there was a brief by *Arnold C. Otto* of Milwaukee, attorney for the appellant.

The motion was granted on May 27, 1919, and the cause was reargued October 11, 1919.

The following opinion was filed December 2, 1919:

WINSLOW, C. J. The reargument has convinced us that we were in error in reversing the judgment in this case, and the former opinion must be considered as withdrawn and the judgment of reversal set aside.

The trial court's findings were that both deeds were delivered with the intention of conveying the property, but this court held that these findings were contrary to the clear preponderance of the evidence and that the evidence demonstrated that the deeds were understood by all parties to be testamentary documents only and were never delivered with intent that they should take effect as deeds. We now think that this was an erroneous holding. The only direct testimony as to what was done with the deeds after their execution was the testimony of Frank Suelflow, the real-estate man, the grantee named in the first deed. He testified directly that Mr. Witt executed the first deed running to him (Suelflow) and gave it to him, and that he then had another deed made out signed and executed by himself and wife, and that he (Suelflow) gave both deeds to Mrs. Witt

for the purpose of conveying the property to her. No witness details the conversation which occurred on either occasion, but Suelflow says, and in this testimony is sustained by Damkoehler, that Witt wanted to deed his property to his wife because he was sick and he might die, and in case he died the property would be assigned to his wife, and that the deeds were not to be recorded until after his death. The appellant's proposition is in brief that this evidence last referred to overcomes the inference of delivery naturally to be drawn from the manual tradition of the deeds.

Mature consideration convinces us to the contrary. The conclusion rather is that the deeds were intended to be legally effective at once (in the sense of not being subject to revocation), but were expected not to pass the title until the happening of an outside event, namely, the death of the grantor; in other words, the grants were upon condition.

No court has more positively or consistently held that there cannot be a conditional delivery of a deed to the grantee himself than this court. In *Hinchliff v. Hinman,* 18 Wis. 130, it was held that if a deed is executed and delivered with intent to pass the estate to the grantee it must so operate though both parties supposed that it would not take effect until recorded and also supposed that while unrecorded the grantor might control or revoke it. In *Lowber v. Connit,* 36 Wis. 176, it was said that if a grantor of land does not intend his deed to take effect until some condition is performed he must keep it to himself or leave it in escrow with a stranger and not deliver it to the grantee. In *Prutsman v. Baker,* 30 Wis. 644, the subject of conditional delivery of a deed was discussed by Chief Justice DIXON, who said: "A conditional delivery is and can *only* be made by placing the deed in the *hands of a third person,* to be kept by him until the performance of some condition or conditions by the grantee or some one else, or until the happening of some event" when it is to be delivered by the depositary to the grantee. These cases were followed in *Rogers*

v. Rogers, 53 Wis. 36, 10 N. W. 2, in which it was held that if a grantor did not wish his deed to go into effect at once he should keep it to himself or place it in the hands of a stranger and not deliver it to the grantee. And these cases are in accord with the general current of authority to the effect that a delivery in escrow or upon conditions cannot be made to the grantee himself, and that such a delivery at once becomes absolute and the supposed conditions are of no effect. 18 Corp. Jur. p. 211; 16 Cyc. 571; 1 Warvelle, Vendors, p. 517; *Worrall v. Munn,* 5 N. Y. 229; *Braman v. Bingham,* 26 N. Y. 483; *Wallace v. Berdell,* 97 N. Y. 13; *Blewitt v. Boorem,* 142 N. Y. 357, 37 N. E. 119; *Hamlin v. Hamlin,* 192 N. Y. 164, 84 N. E. 805; *Hovey v. Hovey,* 170 N. Y. Supp. 822, affirmed 183 App. Div. 184; *Beers v. Beers,* 22 Mich. 42; *Wipfler v. Wipfler,* 153 Mich. 18, 116 N. W. 544; *Fairbanks v. Metcalf,* 8 Mass. 230; *Fletcher v. Shepherd,* 174 Ill. 262, 51 N. E. 212; *Blake v. Ogden,* 223 Ill. 204, 79 N. E. 68.

The reason of the rule is quite obvious. If it were possible to prove in every case that parol conditions were attached to the formal delivery of a deed there would be no safety in accepting a deed. Titles would be open to attack at all times, and the practical result would be to defeat the solemn provisions of a duly executed and formally delivered deed by parol testimony. There were circumstances in the present case tending quite persuasively to show that both Mr. and Mrs. Witt supposed that the title remained in Mr. Witt during his life, but of course their erroneous impression as to the legal effect of the transaction could not control that effect. If the law is, as we now hold, that such conditional delivery made to the grantee at once becomes an absolute delivery freed of the supposed conditions, then the controversy here is closed, because the title at once passed in spite of the idea of the parties that it was not to pass until after Mr. Witt's death.

There are authorities justifying more or less satisfactorily our former holding, some of which will be found cited

in the former opinion. It will be found, however, on close examination of most of these cases that they are cases where, although the grantee had manual possession of the deed, it affirmatively appeared that the grantor retained control over it. Conceding in the present case that there is some testimony tending to show that the grantor expected to retain control over the deeds, it certainly cannot be said to be sufficient to overturn the findings of the trial court that the deeds were delivered with intent to convey the property. These findings are founded on sufficient affirmative evidence, are not against the clear preponderance of the evidence, and hence must stand.

By the Court.—Judgment affirmed.

SIEBECKER and VINJE, JJ., dissent.

A motion by appellant for a rehearing and for a modification of the mandate as to costs, made December 31, 1919, was denied, with $25 costs, on February 10, 1920.

BRENNER, Appellant, vs. HERUBEN and another, Respondents.

December 6, 1919—February 10, 1920.

Workmen's compensation: Waiter in restaurant grinding meat: Service incidental to employment: Finding of industrial commission: Constitutional law: Waiver of right to raise question by election to come under the act: Treble damages to minor employed without permit.

1. In a proceeding under the workmen's compensation act to obtain compensation by a helper in a restaurant injured while grinding meat for Hamburger steak, a finding of the industrial commission that grinding the meat was incidental to the employment is *held* to be sustained by the evidence.
2. A finding by the commission that such work was incidental to plaintiff's employment within the meaning of the compensation act must stand as a verity in the case when based on substantial evidence.

3. An employer who had elected to come under the compensation act could question the constitutionality of an amendment thereto which was enacted and took effect after July 1, 1917, he having had no option to withdraw, in view of sec. 2394—5, Stats., until July 1st of the succeeding year.
4. The amendment of 1917 (ch. 624, Laws 1917) to the workmen's compensation act, providing that compensation be trebled if an injured employee be a minor of permit age and at the time of the injury is allowed to work without a written permit issued pursuant to sec. 1728*a*, Stats. 1917, is germane to the act, and is constitutional and not violative of the right to trial by jury.

ESCHWEILER and ROSENBERRY, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to review an award of the *Industrial Commission* in favor of the defendant *Peter Heruben,* who was a minor under seventeen years of age and was injured while in the employ of the plaintiff without having a permit as required by sec. 1728*a,* Stats. 1917. The *Commission* awarded *Heruben* $925.64 damages under the schedule of the compensation act, and the further sum of $1,851.28 increased compensation under the provisions of sub. 6, sec. 2394—9, which provides that

"Compensation and death benefits, as provided in sections 2394—3 to 2394—31, inclusive, shall . . . be treble the amount otherwise recoverable:

"(a) If the injured employee be a minor of permit age and at the time of the accident is employed, required, suffered or permitted to work without a written permit issued pursuant to section 1728*a.*"

This latter provision was added by ch. 624, Laws 1917, which was published July 13, 1917, and took effect September 1, 1917. Ch. 674, Laws 1917, published July 17, 1917, and taking effect September 1, 1917, raised the permit age from fourteen to sixteen years to fourteen to seventeen. *Heruben* was employed in August, 1917, and was then several months past sixteen years of age. So as the law then stood he needed no permit at the time he was employed,

but did September 1st and thereafter. He was injured September 7th while grinding meat for Hamburger steak. Plaintiff conducted a restaurant in Superior, and *Heruben* was employed therein as a general helper. The *Commission* found that *Heruben* was performing work incidental to his employment at the time he was hurt and made the award as above stated. The circuit court affirmed the award, and from a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Grace & Fridley* of Superior, and oral argument by *C. R. Fridley.*

A brief was also submitted by *Otjen & Otjen* of Milwaukee on the constitutionality of certain parts of the workmen's compensation act, and oral argument by *C. J. Otjen.*

For the respondent *Heruben* there was a brief by *Dietrich & Dietrich* of Superior.

For the respondent *Industrial Commission* there were briefs by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and the cause was argued orally by *Mr. Gilman.*

VINJE, J. The *Commission* found that *Heruben,* who was a general helper in a restaurant, was performing work incidental to his employment while engaged in grinding meat for Hamburger steak. Plaintiff attacks this finding and urges that *Heruben,* whose chief employment consisted in serving tea, coffee, and milk, was not engaged in work incidental to his employment at the time he was hurt. This contention must be attributed to a lack of restaurant experience rather than to a want of knowledge of the conclusive character of findings of fact made by the *Commission* when based upon any competent evidence or upon the common experience of mankind. The patrons of many restaurants would unhesitatingly say that the preparation of Hamburger steak is pre-eminently the most striking example of genuine restaurant service that can be imagined.

But be that as it may, we certainly cannot hold that the finding of the *Commission* has no basis in fact, since it is a matter of common knowledge that Hamburger steak is a customary product of the ordinary restaurant. The *Commission,* therefore, was justified in finding that *Heruben* performed service incidental to, if not inherent in, his employment when he was hurt, and the finding must stand as a verity in the case.

A much more serious question is raised by plaintiff's claim that the amendment of 1917, providing for treble compensation when a minor is employed without a permit, is unconstitutional.

It is suggested by counsel for the *Industrial Commission* that, since the workmen's compensation act is elective, plaintiff cannot question the constitutionality of a law he has elected to come under and from which he can withdraw. Without deciding the question whether an employer can question the constitutionality of any provision of the compensation act contained therein when he elects to come under it, or subsequently added thereto and from which he has had an opportunity to withdraw as provided by sec. 2394—5, Stats. 1917, we are of the opinion that plaintiff here can question the constitutionality of this amendment because he has had no option to withdraw from it since it was enacted. Under sec. 2394—5 he must file with the *Commission* notice of withdrawal for any year beginning July 1st at least thirty days prior thereto. On June 1st this amendment was not in existence. It did not become law till July 13, 1917, when it was published, and it became effective September 1, 1917. When it became a law it was too late for plaintiff to withdraw for the year beginning July 1, 1917, and he was compelled to accept this law for that year at least. He had no election as to whether he should remain in under it for the year specified. Not having any election as to the amendment so far as this accident is con-

cerned, the elective feature of the law cannot be invoked to deprive him of the right to question the constitutionality of the amendment.

The argument against its constitutionality runs in substance like this: Treble compensation is a penalty and its exaction is in fact the enforcement of a penal or criminal statute, namely, that of the child-labor law, which is not in any way germane to the subject of compensation for industrial accidents. The right to a jury trial for the enforcement of a penalty has never been waived by employers in electing to come in under the workmen's compensation act.

It is further argued that sec. 2394—9, Stats. 1917, provides full compensation for injuries sustained by employees and therefore the increased compensation is purely a punishment for violating sec. 1728*a;* that this is further evidenced by the fact that under sub. (7), sec. 2394—9, the employer is made primarily liable for the increased compensation and the insurer only secondarily liable, and that, since there is no relation between the injury sustained and the additional compensation, the classification of minors based upon their having or not having a permit is void because it is not based upon any real distinctions germane to the purpose of the law of which it is a part, citing *Kiley v. C., M. & St. P. R. Co.* 142 Wis. 154, 125 N. W. 464, and *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209.

The argument is not without force, and were we to justify the amendment upon common-law principles alone, without reference to the wide departure therefrom made by the workmen's compensation act, the task would not be an easy one. But the question is not whether it is a justifiable common-law scheme, but whether it is fairly germane to and within the limits of the general scheme of the workmen's compensation act. If it is, then it is constitutional, for an employer in coming under the act waived his common-law remedies and agreed to be bound by the remedies afforded

by the act and all lawful amendments thereto. *Anderson v. Miller S. I. Co.* 169 Wis. 106, 170 N. W. 275, 171 N. W. 935.

Under the common-law scheme the employer must breach his duty to his employee in failing to exercise ordinary care, and because of such delict on his part the employee is entitled to full compensation for injuries resulting proximately therefrom.

Under the scheme of the workmen's compensation act there need be no delict on the part of the employer, and full compensation is not given to the employee for the damage he has sustained, but only partial compensation. Thus for total disability of a person under thirty-two years of age only sixty-five per cent. of his average weekly earnings for not exceeding fifteen years is provided. Sec. 2394—9. It will thus be seen that under the scheme of the compensation act the loss sustained is borne by the employer, the employee, and the public who use the product of the industry in which the employee is engaged at the time of his injury. It is quite evident from the schedule in sec. 2394—9 that the employee usually bears the major part of the damage, even where full statutory compensation is given him. Since he gets compensation irrespective of any negligence on the employer's part; and since it comes to him speedily and without much expense, it is perhaps as desirable as the full compensation given under the common-law scheme, though the latter averages perhaps three times the statutory compensation.

But though the workmen's compensation act is not bottomed upon negligence, it nevertheless recognizes negligence, faults, or delicts in certain cases and gives increased or diminished compensation accordingly. Thus, where an injury is caused by the failure of the employer to comply with any statute of the state or any lawful order of the *Industrial Commission,* compensation and death benefits are increased fifteen per cent. Sub. (5) (h), sec. 2394—9.

Compensation is reduced fifteen per cent. in each of the following cases: (a) Where the injury is caused by the wilful failure of the employee to use safety devices provided by the employer; (b) where the injury results from the employee's wilful failure to obey any reasonable rule adopted by the employer for the safety of the employee; or (c) where injury results from intoxication of the employee. Sec. 2394—9, sub. (5) (i), (j), and (k), respectively. The reason for this is obvious. It is to secure as far as possible compliance with the laws, rules, and regulations adopted to safeguard the life and limb of employees. The state has a direct interest in so doing and may enact reasonable laws to effectuate such purpose. It has enacted a child-labor law for the purpose of insuring an education for children and also for the purpose of throwing around those minors who may be permitted to work in industrial pursuits reasonable safeguards by requiring them to secure permits to work, thus enabling the person authorized to grant or refuse such permit to judge of the fitness of the minor to perform the intended work so far as his strength, health, and safety are concerned. This is a beneficent law and its purpose should not be frustrated by any strict construction. Coming in close touch with this law as do both the workmen's compensation act and the industrial commission act, it will not do to say that they are not germane to the subject of child welfare. Employers under the workmen's compensation act employ minors. This act brings them in direct contact with the child-labor law. They must either comply with it or violate it, every time they hire a minor of permit age.

Previous to the amendment of sub. 1, sec. 1728*h*, Stats. 1913, by ch. 421, Laws 1915, the employment of a minor of permit age without a permit by an employer under the compensation act did not bring the employment under the compensation act, because as the law then stood only minors lawfully permitted to work came under it. Sub. (4), sec. 2394—7. Such employment constituted a misdemeanor,

and the employer in case of injury had no defense to the action. *Stetz v. F. Mayer B. & S. Co.* 163 Wis. 151, 156 N. W. 971. By the amendment of ch. 421, Laws 1915, such employment constituted a misdemeanor only in case the employer suffered, permitted, or required the minor to work at a prohibited employment. *Reiten v. J. S. Stearns L. Co.* 166 Wis. 605, 165 N. W. 337. But the amendment did not bring the employment within the compensation act. It was not until the enactment of ch. 624, Laws 1917, that sub. (4), sec. 2394—7, was amended so as to include a minor of permit age employed without a permit to become an employee under the act. Previous to that amendment injuries to such minors were not compensable thereunder because not employees within the meaning of the law. When this feature of ch. 624 came up for legislative consideration it presented this question: If injuries to minors of permit age employed without a permit are to be compensable under the workmen's compensation act, under what conditions shall they be made compensable so as not to emasculate one of the purposes of the child-labor law? If no civil liability was attached to a violation of sec. 1728*a* by employers under the workmen's compensation act, who constitute the great bulk of employers of minors of permit age in this state, then a part at least of the purpose of the child-labor law would miscarry.

It was no doubt a consideration of those facts that induced the legislature to permit injuries to minors of permit age employed without a permit, in direct violation of the law, to be compensated under the workmen's compensation act upon condition that treble compensation should be paid. It was within the legislative field to prescribe reasonable conditions for permitting injuries under such employments to be so compensated. Conditions thus prescribed cannot be set aside by courts unless so severe as to be confiscatory, or to amount to a denial of due process of law. The condition

in question does not come within either class and must be held lawful.

The classification made by the legislature, if any, is one of employers, not one of minors. It divides them into those who obey the law and those who violate it. Obviously this clear-cut cleavage is one of substance and furnishes a good basis for classification. *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209.

As before stated, delicts of both employer and employee are recognized by the act and are made the basis of difference in the amount of compensation granted. No violation of rights is perceived by so doing. A public policy can be effectuated through the workmen's compensation act in connection with other public laws, and especially so where the laws involved are of a cognate nature. We therefore conclude that the amendment is constitutional and that the judgment must be affirmed.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). The amendment to the workmen's compensation act by ch. 624, Laws 1917, for the treble damages granted by the judgment therein, to my mind provides for a penalty and not compensation, is not germane to the purposes of the act, is violative of the plaintiff's common-law and constitutional right to a trial by jury, and is therefore unconstitutional.

Plaintiff pays twice as much more than he otherwise would, not because the injury is greater, but because he has violated the penal provisions of a separate law regarding the employment of children, viz. sec. 1728*a*, Stats., a law applicable alike to those not under as to those under the compensation act.

The employer not under the compensation act but violating sec. 1728*a* in the manner here charged is subject to the penalty, under sub. 1, sec. 1728*h*, of a fine from $10 to $200

or thirty days' imprisonment, and has his trial by jury. The employer under the compensation act is alike subject to the same penalty and the same trial in similar proceedings, but in addition thereto must pay treble damages, and that without a trial by jury upon a scintilla of evidence whether there be causal connection between such violation and the injury or act, and only because he is under the compensation act.

In this case there appears to have been no dispute about the facts, but were there a dispute as to the real age of the plaintiff; whether or not there had been misrepresentations made by him or on his behalf at the time of his employment; or on any other issue, still, under the ruling as it now stands, the defendant would be liable for these treble damages however unintentional his breach of the law may have been, or even had he been lured into it by misrepresentations on behalf of the minor. *Stetz v. F. Mayer B. & S. Co.* 163 Wis. 151,157, 156 N. W. 971. This, too, upon a decision of the *Industrial Commission* on disputed questions of fact, a decision which must be upheld by the circuit court, or this court on review, if supported by the slightest amount of testimony, and in utter disregard of the standard which one who is prosecuted for a violation of a penal statute is entitled to have applied, namely, that the evidence must satisfy beyond a reasonable doubt.

This being a penalty, he cannot be deprived of his right to jury trial. *Wilcox v. Hemming,* 58 Wis. 144, 158, 15 N. W. 435, 61 L. R. A. 410; *State v. Hamley,* 137 Wis. 458, 119 N. W. 114.

To recover in a tort action for injuries claimed to have been received by reason of the negligence arising from the violation of such a penal statute, it is essential that there shall be some causal connection between the two, mere coincidence being not enough. *Pizzo v. Wiemann,* 149 Wis. 235, 239, 134 N. W. 899; *Steinkrause v. Eckstein, ante,*

p. 487, 175 N. W. 988. Such rule is now abrogated by the majority opinion, for the element of proximate cause as heretofore defined in negligence cases is not a requirement in order to establish liability under the compensation act. *Milwaukee v. Industrial Comm.* 160 Wis. 238, 246, 151 N. W. 247.

And moreover, plaintiff in this particular case is now held bound by such an amendment to the law from which he had no chance to escape, and for an act which was not penalized under the child-labor law until after he had become so bound, and yet it had been said by this court at the very threshold of the administration of this law that it is not coercive but free. *Borgnis v. Falk Co.* 147 Wis. 327, 356, 133 N. W. 209.

This court said in *Anderson v. Miller S. I. Co.* 169 Wis. 106, 170 N. W. 275, 171 N. W. 935:

"The liability of the employer under the act is not based upon any wrongful conduct or negligent act of the employer. However blameless the employer may be, he is nevertheless liable if the employee be injured and he bring himself within the terms of the act." Page 110.

Again: "The liability of the employer under the compensation act is not based upon the employer's neglect of duty and is therefore not tortious." Page 113.

"We therefore hold that the principles which are applicable to actions *ex delicto* should not be applied to claims arising under the workmen's compensation act," etc. Page 118.

The effect of the legislative amendment now upheld by the majority opinion in this case is to engraft into the provisions of the workmen's compensation act an additional and substantial provision for a liability which can arise only by reason of a *tort* of the employer. It incorporates a provision of a nature which this court has heretofore expressly said was not within the purpose and scope of the workmen's compensation law. It is therefore not germane to the de-

clared purposes of the law. It is a violation of one of the canons of the law regarding classification. *Borgnis v. Falk Co.* 147 Wis. 327, 353, 354, 133 N. W. 209.

To say, as does the majority opinion, of the present situation, "The classification made by the legislature, if any, is one of employers, not one of minors. It divides them into those who obey the law and those who violate it," thereby expressly recognizes that the employer who may be deemed by the *Industrial Commission* to have violated the penal provisions of the child-labor law shall be treated differently in the awarding of compensation than he who has not violated such a law. It amounts to the statement in another form of the proposition that the workmen's compensation act shall award under the name of compensation that which is in reality a fine for a violation of a penal statute. To base this allowance of treble damages upon what is such an apt definition of a penalty based upon a tort and then name it compensation, based upon contract, is passing strange to say the least.

The primary purpose of the workmen's compensation act being to secure the payment of compensation to the injured employee, it for that reason provides for the carrying of industrial insurance by the employer and makes such insurance company absolutely liable for the payment of such compensation. By the amendment in question both the employer and the insurance company are prohibited from contracting in such manner that the employer is not primarily liable for these treble damages. In other words, the legislature provides that as to this form of so-called compensation the remedies against the employer must be first exhausted and recourse cannot be had against the insurance company until and after it appears that the employer cannot pay the amount. It is pertinent to ask at this stage whether or not the judgment that may be entered upon this award is a tort judgment upon which the defendant employer against whom it is entered may be jailed in default of payment, or whether

it is a judgment on contract or debt for which the constitution prohibits imprisonment? Why, if its purpose be compensation, must the claimant resort to this circuitous route to obtain it?

Under the workmen's compensation act, sec. 2394—35, the employer is bound to keep a record of all such accidents in a form that the industrial board may prescribe and is compelled to make monthly reports of such records to the industrial board, and the same is open at all times to the board, and the violation of such provisions is punished by the forfeiture of $50 for every such violation or neglect. And although it is provided by sec. 2394—38 that "any statement contained in any such record or report shall not be admissible as evidence in any action arising out of the death or accident reported," yet nevertheless it has been held that statements made by the employer to the *Industrial Commission* may be considered by the *Commission* in determining the questions of fact before it, even though not formally offered in evidence. *F. Eggers V. S. Co. v. Industrial Comm.* 168 Wis. 377, 380, 170 N. W. 280; *First Nat. Bank v. Industrial Comm.* 161 Wis. 526, 154 N. W. 847. Such a report as bearing upon the nature of the employment of the claimant was used in this very case as against the plaintiff.

This court held in *State ex rel. Schumacher v. Markham,* 162 Wis. 55, 155 N. W. 917, that in an action to enforce a penalty a defendant cannot be compelled to bear witness against himself. The administration of the workmen's compensation act under the provisions as they now stand and are being administered does in effect compel him who is now required to pay just such a penalty to furnish evidence against himself. And by sec. 2394—16, Stats., he can be compelled to testify or be held guilty of a misdemeanor.

Cohn v. Neeves, 40 Wis. 393, was cited on behalf of the respondent *Industrial Commission* to the proposition that treble damages may be lawfully assessed in a tort action.

That case held, however, that such a provision for the recovery of treble damages for conversion of logs or lumber is a penal statute, must be strictly construed, and even though the language used was general, and if literally interpreted would include any conversion, yet it would *not* be so construed, and there used language that seems to me particularly applicable to situations like those here. Quoting now from page 401:

"The evidence must satisfy the jury that the conversion was not only against the consent of the plaintiff, but was attended by circumstances of bad faith and intentional wrong, in order to bring it within the penal provision. For, unless the conversion was wilful or wanton, the plaintiff was entitled to recover only single damages."

The same point is reiterated and strongly emphasized in a case involving a claim for treble damages for a violation of the public utilities act. *Krom v. Antigo Gas Co.* 154 Wis. 528, 535, 536, 140 N. W. 41, 143 N. W. 163. The rule there again recognized is in effect overruled by the majority opinion herein. That such penal provisions must be strictly pursued, see, also, *Menasha W. W. Co. v. Winter,* 159 Wis. 437, 453, 150 N. W. 526; *State v. Cleveland,* 161 Wis. 457, 458, 152 N. W. 819, 154 N. W. 980. The workmen's compensation act, however, must be liberally construed. *Holt L. Co. v. Industrial Comm.* 168 Wis. 381, 383, 170 N. W. 366. In the future administration of the law as it is now declared to be by the majority opinion, there will be considerable difficulty in reconciling such evident clashing of rules as to strict and liberal construction in order that fairness to well grounded rights and legal principles may be shown and true justice done.

All these distinctions above stated are wiped out by the effect of this decision, and he who has unintentionally and without the slightest negligence on his part violated the provisions of the child-labor law, whether such violation has any causal connection with the resulting injury or not, must

nevertheless pay as a penalty therefor treble damages assessable upon the slightest evidence and without a jury trial. Such a judgment against him must be affirmed by this court unless there is an entire lack of evidence to support it. *Oldenberg v. Industrial Comm.* 159 Wis. 333, 335, 150 N. W. 444. I think there is no legal or logical foundation for so much of the judgment as awards treble damages.

ROSENBERRY, J., dissents.

JAEGER, Appellant, vs. STRATTON, Respondent.
[Two cases.]

January 13—February 10, 1920.

Physicians and surgeons: Malpractice: Failure to diagnose properly: Degree of skill required: Evidence: Directed verdict.

1. Where, in an action for malpractice, the medical testimony showed that the failure of a physician to accurately diagnose plaintiff's condition was not due to lack of skill, care, or judgment, a directed verdict in his favor was proper although in the course of an operation disclosing pregnancy plaintiff's inflamed appendix had been removed contrary to her wish that she should not be operated upon if she were pregnant, she having consented to an operation if not pregnant and instructed the physician to remove the appendix if an operation was performed.
2. Where a physician exercises that degree of care, diligence, judgment, and skill which others in good standing of the same school of medicine usually exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of science at such time, failure to diagnose correctly does not render him liable.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Actions for malpractice. The defendant performed an operation upon *Helena Jaeger*, the wife of *William Jaeger*. It is claimed that by reason of a negligent diagnosis and the performance of an unnecessary operation *Helena Jaeger*

was caused long-continued pain and suffering and rendered unable to perform her customary work. The husband sued for medical expenses, loss of service, etc., and the wife for pain and suffering. By stipulation the actions were consolidated and tried as one. At the close of the evidence the court directed a verdict in favor of the defendant, and from a judgment entered accordingly the plaintiffs appealed.

For the appellants there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *W. B. Rubin* and *C. F. Rouiller,* of counsel, all of Milwaukee, and oral argument by *Mr. Rouiller.*

For the respondent there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

VINJE, J. The plaintiff *Helena Jaeger* at the time she was examined by the defendant, February 26, 1918, had borne nine children. Her menses had ceased at Christmas, 1917, and she feared she might be pregnant. She suffered from headache, gas in the stomach, and severe bearing-down pains in the lower abdomen. She had not had such pains in her former pregnancies and so became alarmed and consulted a Dr. Walters, who did not definitely diagnose her condition but suggested pregnancy, a tumor, or inflammation of the appendix, and advised her to come back in a couple of months. Instead of doing so she went to the defendant, who found a serious inflammatory condition, with pain and tenderness in the lower abdomen. The uterus was somewhat enlarged and there appeared to be an inflammatory mass in the broad ligament. The defendant diagnosed the latter as the chief cause of the trouble, though he thought it might be appendicitis or possibly pregnancy. He advised an operation. She said she did not want to be operated upon if she was pregnant. He told her he thought she was not. She consented to an operation and told him to remove the appendix when he took out the tumor.

The operation disclosed that she was about two-and-one-half months pregnant and that she had an inflamed appendix covered with a Jackson's membrane. The appendix was removed and she made a normal recovery, and in time gave birth to a living and healthy child.

The medical testimony showed without dispute that the failure to accurately diagnose her condition was due neither to lack of care, skill, or judgment; that under the conditions as they appeared an early operation was advisable; that the operation was skilfully performed; that she made a normal recovery, and was relieved from a menace that might have resulted very seriously during later pregnancy by having to have the inflamed appendix removed. In view of such testimony the trial court properly directed a verdict for defendant.

When a physician exercises that degree of care, diligence, judgment, and skill which physicians in good standing of the same school of medicine usually exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of medical or surgical science at the time, he has discharged his legal duty to his patient. *Nelson v. Harrington,* 72 Wis. 591, 40 N. W. 228, and note in 1 L. R. A. 719; *Wurdemann v. Barnes,* 92 Wis. 206, 66 N. W. 111; *Marchand v. Bellin,* 158 Wis. 184, 147 N. W. 1033; *Hrubes v. Faber,* 163 Wis. 89, 157 N. W. 519.

Where due care, diligence, judgment, and skill are exercised, a mere failure to diagnose correctly does not render a physician liable. *Sherwood v. Babcock* (Mich.) 175 N. W. 470; *English v. Free,* 205 Pa. St. 624, 55 Atl. 777; *Wells v. Ferry-Baker L. Co.* 57 Wash. 658, 107 Pac. 869; *Gedney v. Kingsley,* 41 N. Y. St. Rep. 794, 16 N. Y. Supp. 792, and note in *Bonnet v. Foote,* 28 L. R. A. N. S. 136. Not omniscience, but due care, diligence, judgment, and skill, are required of physicians. When they meet such test they are not liable for results or errors in judgment.

By the Court.—Judgment affirmed.

GORDON, Administratrix, Respondent, vs. WISCONSIN NATIONAL BANK, Appellant.

January 13—February 10, 1920.

Negligence: Removing ice from building: Pedestrian killed by falling ice: Contributory negligence: Disregarding rope barrier.

Where a rope was stretched from a building, from the roof of which ice was being removed, to a point near the street-car tracks, it was not negligence as a matter of law for one alighting from a car to pass alongside the car and by a man holding the rope, though he was killed by falling ice.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Personal injury. On the morning of the 11th of February, 1918, the deceased, husband of plaintiff, was on a street car traveling south on East Water street in the city of Milwaukee. The car stopped on East Water street, north of the intersection of Wisconsin street. The deceased alighted and passed south alongside the car and by a man holding the end of a rope reaching from near the car to the Pabst building, and while he was in the street, next to the car, was hit on the head by a piece of falling ice and instantly killed. The ice was loosened by employees of defendant in the course of removing it from the roof of the building.

The plaintiff brought this action, and from the judgment awarding her $10,000 damages and costs defendant appeals.

For the appellant there was a brief by *Burr J. Scott,* attorney, and *Lawrence A. Olwell,* of counsel, both of Milwaukee, and oral argument by *Mr. Scott.*

For the respondent there was a brief by *Carroll & Carroll* of Milwaukee, and oral argument by *George J. Carroll.*

ROSENBERRY, J. The sole contention made on the appeal is that the deceased was guilty of contributory negligence as a matter of law. This clear-cut issue has been fully and

ably argued and we have given the matter the attention that the importance of the case demands. The contention of the defendant is briefly that, in passing by the man who held the rope, the deceased was warned of the fact that he was in the zone of danger, and that his failure to accept the warning and his entrance into the zone of danger constitute contributory negligence as a matter of law. While the argument is persuasive there is no circumstance or combination of circumstances which is conclusive upon this question. The evidence no doubt would sustain a finding of the jury either way. Reasonable men might well come to different conclusions upon the facts and circumstances appearing in the evidence; it is therefore a jury question, and the trial court rightly so held.

By the Court.—Judgment affirmed.

KESSLER, Respondent, vs. LEINSS and wife, Appellants.

January 14—February 10, 1920.

Release: Validity: Parties dealing at arm's length: Compromise and settlement: Policy of law to encourage amicable adjustments.

1. Where one defrauded in an exchange of real property, after bringing an action to cancel the deeds and have the title restored to her, gave the defendant whom she claims committed the fraud a release from all claims she might have against him upon his promise that he would procure in exchange certain property for her, and the next day he told her that such property could not be had and offered to secure in exchange other property, and she thereupon had her attorneys procure an appraisal of the property, after which she consummated an exchange and stipulated a dismissal of her action, she cannot avoid the release of her cause of action against the defendant.
2. It is the policy of the law to encourage rather than discourage amicable adjustments of controversies; and while it frowns upon imposition and fraud in the procurement thereof and will protect the victimized therefrom, it will not relieve from merely improvident settlements.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Plaintiff owned two pieces of property in the city of Marinette. She listed these properties in March, 1916, with defendant *Ernst Leinss,* a real-estate broker of the city of Milwaukee, for sale or exchange. On the 28th day of July, 1916, upon the advice or at the solicitation of defendant *Ernst Leinss,* she conveyed her Marinette properties to the defendant *Louise Leinss,* wife of the defendant *Ernst Leinss,* and received in exchange therefor two pieces of property located on Eighth street in the city of Milwaukee, one of said properties having been conveyed to her by deed from Jacob Espovich and Mildred Espovich, his wife, and the other by deed from Johanna Warschauer. Being dissatisfied with the exchange, upon the advice of the defendant *Ernst Leinss* she conveyed one of the Eighth-street properties, about a month later, for another located at Fifth and Walnut streets. On the 6th day of September, 1916, feeling that she had been defrauded and damaged by reason of these exchanges of property, she brought an action in the circuit court for Marinette county against these defendants and her various grantors to have the transactions set aside and the deeds executed by her of her Marinette properties canceled and title thereto restored to her. On the 18th day of September she executed and delivered to the defendant *Ernst Leinss* a release of all the defendants in that action from any claims of whatsoever kind and nature she might have against them. She was induced to execute this release upon the promise of *Ernst* that he would procure for her, in exchange for her then Milwaukee properties, certain property located at Thirteenth and Cedar streets. The next day, however, he advised her that he was unable to procure the property at Thirteenth and Cedar, and suggested that she take in lieu thereof property on Sycamore street. Her attorneys procured an appraisal of the Sycamore-street

property, and she exchanged her properties for the Sycamore-street property, after which, and on the 18th day of October, her attorneys signed a stipulation dismissing the Marinette county case. It seems that she was again dissatisfied with the deal by which she had secured the Sycamore-street property and, upon the advice of *Leinss,* she again traded the Sycamore-street property for property located at Second and Walnut streets. Still feeling that she had been defrauded, she thereafter brought this action against the defendant *Ernst Leinss* and *Louise Leinss,* his wife, to recover damages resulting from fraudulent representations made by them by which she was induced to make the various exchanges of property above recited.

The jury returned a special verdict by which they found that in all of the transactions *Ernst Leinss* acted as the agent of plaintiff, and that she was induced to make each exchange of property by reason of false and fraudulent representations made to her by him. They found the value of the Marinette property to be $10,500, and the value of the Milwaukee property, then owned by her, to be $16,260 (upon which there was a mortgage of about $14,000), and assessed her damages at $7,072, for which amount judgment was rendered upon the special verdict of the jury, from which judgment defendants appealed.

For the appellants there was a brief by *Friedrich, Teall & Hackbarth* of Milwaukee, and oral argument by *Otto G. Hackbarth.*

F. P. Hopkins of Milwaukee, for the respondent.

OWEN, J. If plaintiff, by the writing of September 18th, effectually released defendants of any claim she may have had against them, it is unnecessary to consider the numerous other alleged infirmities in the judgment.

It will be noted that she first traded her Marinette property for property on Eighth street in Milwaukee. She was not satisfied with this exchange, and shortly thereafter, upon

the advice or solicitation of defendant *Ernst Leinss,* traded one of the Eighth-street properties for property at Fifth and Walnut streets. This transaction also proved disappointing, and she brought an action in the circuit court for Marinette county against all in any manner connected with the deals by which her Marinette property had been converted into the Milwaukee properties which she then had, praying for cancellation of the deeds by which she conveyed the Marinette property. That action was commenced on or about the 6th day of September, 1916. On the 18th day of September plaintiff made and delivered to *Ernst Leinss* a document in the nature of a general release, by the terms of which she amply released all defendants in that action of all claims and demands, actions and causes of action, which she had against them. She claims that she was induced to sign this release upon the promise of the defendant *Ernst Leinss* that he would bring about an exchange of her then Milwaukee properties for certain property at Thirteenth and Cedar streets in the city of Milwaukee. The next day, after the release was signed, *Leinss* told her that he could not secure the property at Thirteenth and Cedar. We presume that she might have avoided the release upon such failure of consideration. But she made no attempt to do so. He suggested another exchange for property on Sycamore street. Remember now that her action in Marinette county for cancellation of her original deeds was still pending. She was represented in that action by a firm of Milwaukee attorneys. If in her original transaction she had reposed undue confidence in defendant *Ernst Leinss,* her experiences up to that time were such as should have thoroughly disillusionized her in that respect. He had secured a release from her upon promise that he would procure, for her, property at Thirteenth and Cedar streets, which she desired. Almost immediately after putting the release in his pocket he advised her that the desired property could not be procured and suggested another exchange.

Certainly she was not justified in placing further confidence in him, and it appears that she did not. On the contrary, she had her attorneys procure an appraisal of the Sycamore-street property, after which she consummated the exchange, permitting *Leinss* to retain the release of September 18th, and on October 18th her attorneys stipulated a dismissal of the Marinette action. Under such circumstances we know of no theory upon which the release can be avoided. She was a person *sui juris*. She was dealing at arm's length with one against whom charges of fraud preferred by her were pending. She was acting upon her own responsibility, with the benefit of counsel. If she was not bound by such a release, it must be confessed that there is little stability to legal settlements. It is the policy of the law to encourage rather than discourage amicable adjustments of controversies. While it frowns upon imposition and fraud in the procurement thereof and will protect the victimized therefrom, it will not relieve from merely improvident settlements, and we see no other reason for disturbing the adjustment here in question.

It results that whatever cause of action plaintiff may have had against the defendants was amply released and discharged before the bringing of the present action.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment dismissing plaintiff's complaint.

BYRNE BROTHERS COMPANY, Appellant, vs. BARNEKOW, Respondent.

January 14—February 10, 1920.

Account stated: Implied promise to pay; Evidence.

1. Where, in an action by a mason contractor against a general contractor upon an account stated, it appeared from the evidence that there were disputed items, concessions made, and a final balance struck, an account stated might properly be found.
2. If there is an account stated, an implied promise to pay arises.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The plaintiff, a mason contractor, sued the defendant, a general contractor, upon an alleged account stated.

The defendant admitted that the parties met for the purpose of adjusting the accounts between them, but denied that any agreement was made. And further answered by way of counterclaim alleging certain payments made by him for which he had not received credit, certain overcharges by plaintiff, and damages from failure of plaintiff to do certain work in a proper manner.

The issues were tried in civil court without a jury. and findings of fact made to the effect that the plaintiff had performed labor and furnished material for and on behalf of the defendant, and that in December, 1917, an accounting was had between the parties and an account stated whereby it was determined that there was $370.80 as a balance due from defendant to plaintiff; that the defendant was not entitled to recover anything under his counterclaim, and directing dismissal of the same and judgment in favor of plaintiff for said sum and interest. From a judgment entered thereupon the defendant appealed to the circuit court, which court reversed and set aside the judgment of the civil court and directed that a new trial of the issues in the circuit court be had. There is nothing to show the grounds upon which such reversal was had.

From such order of the circuit court the plaintiff has appealed.

For the appellant there was a brief by *Alfred Kay,* and oral argument by *Irving T. Fish,* both of Milwaukee.

For the respondent there was a brief by *Perry & Perry* of Milwaukee, and oral argument by *Raymond J. Perry.*

ESCHWEILER, J. For several years prior to February, 1917, the plaintiff company had been doing cement and concrete work in and about the basements of structures which were being erected by the defendant, and payments were made from time to time by defendant.

In February, 1917, plaintiff rendered an itemized statement of its charges for such work and materials furnished and of the payments or credits on the same for the period from January 1, 1915, starting with a then balance claimed to be due from defendant of $148.12. The debit items in such statement aggregated over $11,000, and the balance after deducting credits was $1,842.32.

Statements of account were subsequently rendered by plaintiff to defendant under dates of May 1, July 1, and December 1, 1917, showing subsequent charges and credits, each of such statements carrying forward the balance that appeared on the preceding one.

A final statement was rendered December 31, 1917, starting with the debit of $478.26 from the statement of December 1st, and giving credit for an item of $29.20 and another of $78.22 as on account of two transactions that were included in the statement of February 1, 1917.

An examination of the testimony convinces us that where, as here, there were disputed items, concessions made, and a final balance struck, the court might properly find an account stated. *Segelke & Kohlhaus M. Co. v. Vincent,* 135 Wis. 237, 240, 115 N. W. 806; 1 Corp. Jur. p. 688; *Hoover-Dimeling L. Co. v. Neill,* 77 W. Va. 470, 87 S. E. 855; *Gwathmey v. Burgiss,* 104 S. C. 280, 88 S. E. 816.

Although the trial court did not expressly find that there

was an express promise on the part of the defendant to pay such agreed balance, though there was testimony that such a promise was made, still there arises upon such a situation an implied promise to pay. *Rose v. Bradley,* 91 Wis. 619, 625, 65 N. W. 509.

No valid reason is therefore disclosed for a reversal of the judgment of the civil court, and it must stand.

By the Court.—Order of the circuit court reversed, and the judgment of the civil court affirmed.

LUETHE, Appellant, vs. SCHMIDT-GAERTNER COMPANY, Respondent.

January 14—February 10, 1920.

Automobiles: Negligence: Opinion evidence as to speed based on skid marks of wheels: Contributory negligence: Crossing in front of a street car: Trial: Special verdict: Instructions: Correction of error by trial court: Appeal: Harmless error.

1. In a personal injury action, where plaintiff was struck by a motor truck, evidence that there were skid marks of the truck wheels on the street for a distance equal to the street crossing and other evidence showing long skid marks furnished proper grounds for an expert to give his opinion as to the truck's speed when the brakes were applied.
2. Where plaintiff crossed in front of a street car which she was intending to board and was struck by defendant's automobile, proceeding in the same direction as the street car, the submission in the special verdict of a question whether the speed of the automobile was more than ten miles an hour was not error misleading the jury on the matter of the driver exercising ordinary care, where through confusion the court directed the jury that they need not answer the question of speed in the event of answering that the driver was negligent, which the court corrected on his attention being called thereto, informing the jury that, if they answered that the driver exercised ordinary care, no answer would be required to the question as to the speed of the automobile.
3. In view of sec. 1636—49, Stats., requiring that no automobile shall be operated recklessly or at a speed greater than reasonable and proper, which shall be so reduced at any street or crossroad as to avoid danger of accident, the evidence is

held to present a question for the jury as to the negligence of the defendant driver, and not to warrant holding the driver not guilty of want of ordinary care as a matter of law.

4. Where the jury found that the driver failed to exercise ordinary care and that such failure was the proximate cause of plaintiff's injuries, questions as to whether the truck was driven at an excessive speed, and whether such speed was the proximate cause of the injury, became immaterial and superfluous in establishing actionable negligence.

5. Where the evidence was conflicting as to plaintiff's course of travel after observing the car, whether the car had come to a full stop before she crossed in front of it, and whether the truck driver had opportunity to observe that the car was slowing down, and as to the speed of the truck, the question of contributory negligence was for the jury.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

The plaintiff brought this action in the civil court of Milwaukee county to recover damages for a personal injury. The case was tried to the court and a jury. The civil court awarded judgment in plaintiff's favor on the verdict of the jury. The circuit court, upon appeal, reversed the judgment of the civil court and awarded judgment dismissing plaintiff's complaint with costs.

The complaint alleges that on May 31, 1916, while driving a motor truck along Murray avenue in the city of Milwaukee, the defendant ran into and upon plaintiff on the sidewalk crossing of Murray avenue, near the southwest corner where it intersects Belleview place; that the collision was proximately caused by the negligent operation of defendant's motor truck, which was being operated at a high rate of speed and greater than was reasonably safe in view of the traffic under the circumstances; that defendant did not keep a proper lookout for pedestrians using the street at the point of collision; and that defendant violated the Milwaukee city ordinance regulating the manner of operating automobiles when they undertake to pass street cars discharging or taking on passengers.

The defendant answered denying that it was guilty of negligence as charged in the complaint, and alleged that the injuries plaintiff is alleged to have suffered were proximately caused by her own negligence.

The case was submitted to the jury upon a special verdict, who found: (1) that the plaintiff was injured by being struck by defendant's motor truck at the time alleged at the corner of Murray avenue and Belleview place in the city of Milwaukee; (2) that the driver of the truck failed to exercise ordinary care at the time plaintiff was struck; (3) that such failure to exercise ordinary care was the proximate cause of the plaintiff's injuries; (4) that defendant's truck was driven at a rate of speed in excess of ten miles per hour as it passed the street car at the time in question; (5) that such excessive speed was the proximate cause of plaintiff's injuries; (6) that plaintiff at the time of the accident was exercising ordinary care; (7) damages.

The testimony most favorable to the plaintiff is the testimony of herself, her husband, and the motorman driving the street car which plaintiff and her husband were attempting to board. This evidence tends to show that plaintiff walked partly over the east crosswalk of Murray avenue where it crosses Belleview place; that she then signaled to the motorman on the approaching street car, coming south on Park avenue, to stop for her at the south crossing of Murray avenue and Belleview place; that the street car was then about fifteen feet north of the north crossing of Belleview place; that the motorman observed her signal and slacked his car to stop and take her on at the southwest corner of Murray avenue and Belleview place; that plaintiff walked to the center of Belleview on the east crossing of Murray avenue, and then walked diagonally toward the south crossing of Belleview over Murray avenue to a point on the south-bound car track a little north of the south Belleview crossing; that the motorman observed her, slowed down the speed of his car and stopped so that she could

pass in front of it without its colliding with her; that she passed in front of the car, and, as she emerged from in front of the street car, defendant's motor truck struck her and injured her. Defendant's truck was being driven past the street car before it struck plaintiff. It appears that plaintiff did not look as she crossed in front of the street car to see if any vehicle was coming from the north on the west of the street car, nor did the driver of the motor truck see the plaintiff before she had crossed the car track and emerged from the front of the street car. There is evidence sustaining these ultimate facts. Other evidence is in conflict therewith and tends to show that plaintiff crossed diagonally on Belleview from the northeast corner where it crossed Murray avenue to the southwest corner; that she ran in front of the street car north of the south crossing on Belleview before the street car had come to a stop. The evidence bearing on the speed at which the truck was being driven immediately before and at the time of collision is in sharp conflict, ranging from fifteen miles per hour to a very slow speed.

The civil court awarded judgment in plaintiff's favor on the verdict. Upon appeal to the circuit court that court reversed the judgment of the civil court and awarded judgment dismissing plaintiff's complaint upon the ground that defendant was not shown to have been guilty of actionable negligence and that plaintiff was guilty of contributory negligence as a matter of law. This is an appeal from the judgment of the circuit court.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee, and oral argument by *Mr. Doe.*

Walter F. Mayer of Milwaukee, for the respondent.

SIEBECKER, J. The circuit court concluded that the driver of the motor truck was not guilty of any want of ordinary care which proximately caused the plaintiff's in-

jury and that the evidence shows conclusively that the plaintiff was guilty of a want of ordinary care which proximately caused her injuries. The circuit court also held that the trial court erred in receiving the opinion evidence as to the speed of the truck, based on the skid marks made by the wheels of the truck at the time of collision, and that the court erroneously interjected into the issues submitted to the jury a question as to whether or not the truck was traveling at a speed of ten miles per hour at the time it was driven past the street car.

Was it error to receive the opinion evidence of the witness Baumgartner as to the speed the truck was traveling at the time it passed the street car? There was evidence to the effect that there were skid marks of the truck wheels on the street for a distance equal to the street crossing and other evidence showing long skid marks. This furnished a proper ground for an expert to give his opinion as to the speed at which the truck was traveling when the brakes were applied. It was not error to receive it.

The civil court propounded this inquiry to the jury: "Was the defendant's automobile driven at a greater speed than ten miles per hour while it was passing the street car at the time and place in question?" It is urged by the defendant that the submission of this question was error and misled the jury in answer to the second question of the special verdict, through the confusion of the court in directing the jury that they need not answer this question in the event of answering the second question in the affirmative. True, the court did in the first instance so state, but upon having his attention called thereto he corrected this statement and informed the jury that if the second question was answered in the negative no answer to the fourth question was required. We find no prejudicial error in the record on this ground. The general instruction given which bears on the inquiry propounded by question 2 was a correct statement of the law on the subject and properly informed the

jury as to their duties in considering their answer upon this issue in the case. The duty of defendant in operating its automobile truck on the street is defined by the Statutes (sec. 1636—49):

"No person shall operate . . . any automobile . . . recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highways and the general and usual rules of the road, or so as to endanger the . . . life or limb of any person, . . . provided . . . that . . . at the intersection of any street or crossroad, . . . the speed shall be reduced to such a rate as will tend to avoid danger of accident."

It is manifest, under the facts and circumstances adduced in evidence, that question 2 covers the inquiry as to whether or not the defendant negligently omitted to perform this duty towards plaintiff. We are persuaded that the evidence on this issue of the case presents a question for determination by a jury and that the circuit court erred in setting aside the answer to question 2 and in holding as a matter of law that defendant's driver was not guilty of a want of ordinary care. In the light of this finding and the third finding of the jury that such failure of the driver to exercise ordinary care was the proximate cause of plaintiff's injuries, questions 4 and 5 of the special verdict are immaterial and superfluous to establish defendant's liability for actionable negligence. Further consideration of questions 4 and 5 of the verdict is not required. The verdict is complete and establishes actionable negligence aside from the inquiries in these two questions.

The inquiry remains, Does the evidence sustain the finding of the jury that the plaintiff was not guilty of a want of ordinary care proximately contributing to the injuries? An examination of the evidence has convinced us that the trial court correctly held that the evidence sustains the jury on this issue. The evidence is conflicting on the points as to the course the plaintiff traveled after she observed the street

car coming from the north and which she undertook to board at the southwest corner of Murray avenue and Belleview crossing; how far to the north, if any, of the usual stopping place of the street it stopped on this occasion; whether or not it had come to a full stop before plaintiff crossed in front of it; whether or not the driver of the truck had an opportunity to observe that the car was slowing down to stop or had in fact stopped before he passed it; at what rate of speed he was driving immediately before and at the time of collision with plaintiff, and other points of fact involved in the inquiry as to plaintiff's failure to exercise ordinary care to avoid collision with defendant's motor truck on the occasion in question.

We are of the opinion that it cannot be held as a matter of law that plaintiff was guilty of negligence in her use of the street as a pedestrian at the place she testifies she crossed it in order to reach the point to board the street car. The facts and circumstances disclosing her conduct and acts in accomplishing her purpose are of such a nature as to permit of different inferences as to whether or not she was guilty of any want of ordinary care that contributed to this accident. The evidence on this question presents, in our opinion, a jury issue, and the trial court properly submitted this issue to the jury for determination. It follows that the circuit court erred in reversing the judgment of the civil court.

By the Court.—The judgment appealed from is reversed, and the cause is remanded to the circuit court with direction to affirm the judgment of the civil court.

ESCHWEILER, J. (*dissenting*). The passing by the plaintiff in front of the moving street car and then into the zone of passing vehicles without looking for any vehicle that might be and in this instance was lawfully alongside the moving car, in my judgment was properly declared to be contributory negligence as a matter of law by the circuit court.

GREENE, Respondent, vs. MINN BILLIARD COMPANY, Appellant.

January 14—February 10, 1920.

Brokers: Exclusive agency: Commission paid regardless of who negotiates sale: Contracts: Consideration.

1. An agreement by the owner of real property to pay a broker a commission "if the property is sold or exchanged before this agreement is terminated, regardless of who negotiates the sale," is legal.
2. Such an agreement obligates the owner to pay a commission upon sale of the property within the life of the agreement, though the purchaser was procured by the owner and not by the broker, the agreement being broad enough to require payment to the broker regardless of who procured the purchaser. *Roberts v. Harrington,* 168 Wis. 217, distinguished.
3. A complaint alleging that the broker spent time and money in an effort to sell the property shows a consideration moving since the execution of the agreement and before suit, and, so far as consideration is concerned, an action may be maintained even though the owner was not benefited, as it is sufficient that there was a detriment to the broker.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Action to recover commission on the sale of real estate based upon a written contract, the material portion of which reads:

"You are hereby given exclusive authority to sell the property described on this card for $75,000. In case of sale you are authorized to sign memorandum of sale as agent. . . . I agree to pay a commission to you of three per cent. of the sale price if the property is sold or exchanged before this agreement is terminated, regardless of who negotiates the sale. This agreement is in full force and effect until January 1st, 1919."

The complaint alleges, among other things, that in reliance upon such agreement plaintiff spent money and time in an effort to negotiate a sale of the property, and upon information and belief it is alleged that the defendant sold

the property on or about December 2, 1918, for $75,000, and judgment for $2,250 is asked.

The court overruled a general demurrer to the complaint, and from an order entered accordingly the defendant appealed.

The cause was submitted for the appellant on the brief of *Orth & Orth* of Milwaukee, and for the respondent on that of *Bohmrich & Gabel* of Milwaukee.

VINJE, J. The defendant urges that since the giving of an exclusive agency to sell does not debar the owner from selling within the life of the contract to one not believed to have been procured by the agent (*Greene v. American M. Co.* 153 Wis. 216, 140 N. W. 1130); since the giving of an exclusive sale is similarly construed in *Roberts v. Harrington,* 168 Wis. 217, 169 N. W. 603; and since this contract, like that in the last case cited, is unilateral and without consideration at the time it was entered into, it should receive a construction like that of the *Roberts Case.* In that case the crucial question was, Had the owner parted with authority to sell within the life of the contract? and it was held that he had not because the language of the contract was not specific enough to negative such right of the owner. That it could be negatived was of course taken for granted. The situation there depended upon the construction of the contract alone. That being construed, there was no conflict as to the well known principles that apply to such a contract. The construction of the contract related to the time of its execution, and the fact as to whether or not a consideration passed was deemed material as bearing upon the construction that should be given it; and it was pointed out that, since no consideration there passed from agent to owner, the contract would not upon doubtful language be construed against the right of the owner to sell—that the language barring such right must be clear and unequivocal. It was recognized that at the time the action was brought a

consideration had moved from the agent because it was in evidence that he had spent time and money in trying to sell the property. But since at the time the contract was executed it depended upon the will of the agent whether a consideration should ever move from him, it was said that the situation affected the construction to be given doubtful language in the contract.

Here the question is not, as in the *Roberts Case,* whether the owner has parted with power to sell within the life of the contract, but whether he has agreed to pay plaintiff a commission if property is sold by any one within its life. The language in the contract, "I agree to pay a commission to you of three per cent. of the sale price if the property is sold or exchanged before this agreement is terminated, regardless of who negotiates the sale," seems both clear and specific and seems to contemplate that others than the agent may negotiate the sale, and is equivalent to saying that if a sale or exchange of my property takes place within the life of the contract I will pay you three per cent. of the purchase price—a perfectly legal agreement. The argument by defendant, that the words "regardless of who negotiates the sale" do not include a situation where the purchaser is not procured by the agent, we regard as giving too narrow a meaning to them. They are broad enough to cover the case where the purchaser is procured by the owner or any one else.

Construction by other courts of like or similar contracts is to the same effect. See *Novakovich v. Union T. Co.* 89 Ark. 412, 117 S. W. 246; *Crane v. McCormick,* 92 Cal. 176, 28 Pac. 222; *Metcalf v. Kent,* 104 Iowa, 487, 73 N. W. 1037; *Chapin v. Bridges,* 116 Mass. 105; *Cook v. Blake,* 98 Mich. 389, 57 N. W. 249; *Mercantile T. Co. v. Lamar,* 148 Mo. App. 353, 128 S. W. 20; *Howard & Brown R. Co. v. Barnett* (Mo. App.) 206 S. W. 417; *Stevenson Co. v. Oppenheimer,* 91 N. J. Law, 479, 104 Atl. 88.

The complaint alleges that in reliance upon the agreement

plaintiff spent time and money in an effort to sell the property. This shows a consideration moving since the contract was executed and before suit. That is sufficient to sustain an action so far as consideration is concerned. It may be that the consideration did not benefit the defendant, but it is enough that it was a detriment to plaintiff. *John A. Tolman & Co. v. Infusina, ante,* p. 433, 175 N. W. 916.

By the Court.—Order affirmed.

WARREN, Respondent, vs. GLOBE INDEMNITY COMPANY OF NEW YORK, Appellant.

January 14—February 10, 1920.

Insurance: Occupation of insured: Classification by insurer after full disclosure of duties by insured: Office duties and traveling.

A high-salaried employee of an electric gear shift manufacturing company, whose occupation, consisting of both office work and traveling, was that of interesting automobile manufacturers in the electric gear shift and procuring contracts for equipment of automobiles therewith, and who in visiting manufacturers used an automobile, given him for his personal use, to show how the automobile was equipped with such gear shift, was not an "automobile dealer demonstrating" or a "salesman traveling, selling, operating, exhibiting, or setting up machinery or implements or automobiles," within the classification set out in the manual of rates of an accident insurance company, but was properly placed in the classification of "office duties and traveling" by the agents of the insurer after the insured had fully and fairly stated the nature of his duties, where such classification more accurately described his occupation than any other in the manual.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Insurance. This action was commenced by the plaintiff to recover on a policy of accident insurance issued by the defendant company on October 15, 1915, for the amount of

$15,000 to plaintiff's husband, now deceased. Upon the policy was indorsed a provision by the terms of which, if the insured met his death on a private conveyance, the amount was to be increased to $30,000. The annual premium for the policy was $120, and the premium for the private-conveyance indorsement was an additional $20. The policy was extended on October 2, 1916, for an additional year, and on November 16, 1916, the insured was accidentally killed by the overturning of his automobile, which he was driving from Detroit, Michigan, to Chicago in the course of his duties. All of the transactions in connection with the writing of the contract of insurance and the renewal thereof took place in the city of Chicago, Illinois, and it is conceded that the contract of insurance was an Illinois contract. At the time the policy was written the insured was in the advertising business as an employee of the J. Walter Thompson Company, in the capacity of advertising solicitor, and was rated "Office and traveling," and the premium referred to was based on class 1 in the classification manual.

On or about June 28, 1916, the insured changed his occupation and commenced work for the Cutler-Hammer Manufacturing Company. He stated the facts in relation to his change of occupation to the agents of the defendant company, and a change-of-occupation rider prepared by them was signed by him and attached to and became a part of the policy. It is the claim of the defendant company that the insured did not correctly state his occupation at the time in question; that the insured was a demonstrator of automobiles at the time of the making of the warranty, at the time of the change-of-occupation writing, and at the time of his death.

The policy was written and the premium rated upon the preferred rating of class 1 of "Office duties and traveling," the premium on which was $120. The policy contained a provision, commonly called a "prorate clause," to the ef-

fect that if the insured was injured "while engaged in an occupation classed as more hazardous than that stated herein, . . . liability hereunder shall be limited to such sum as the premium paid would have purchased for the increased hazard according to the company's table of rates. . . ." It was the claim of the defendant that the insured met his death while engaged in the occupation of demonstrating an automobile, and that he should therefore have been rated in class 3, in which class the rate was $160.

At the close of the trial both parties moved for a directed verdict, the jury was discharged, and all controversies of both law and fact were determined by the court. The trial court found for the plaintiff and directed judgment against the defendant for $30,000, with interest and costs, from which judgment the defendant appeals.

For the appellant there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Louis Quarles* and *James T. Guy,* all of Milwaukee.

For the respondent there was a brief by *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, and oral argument by *Geo. B. Hudnall.*

ROSENBERRY, J. It is the contention of the defendant upon this appeal, first, that the insured was a demonstrator at the time of the making of the change-of-occupation rider, and also continuously up to and at the time of his death; second, the statement of occupation of the insured was a warranty, and under the law of Illinois a breach of it voids the contract; third, the insured failed to properly state and fully disclose his occupation to the insurance company; fourth, where a policy is obtained through the insufficient disclosure of his occupation on the part of the insured, the insurance company is not estopped from questioning its validity; fifth, the insured should have been classified as a class 3 risk, either as (a) "Automobile dealer demonstrating," or (b) "Salesman traveling, selling or oper-

ating, exhibiting or setting up machinery or implements or automobiles;" sixth, the double-liability rider should be eliminated, and no recovery based thereon should be allowed, because it could not have been written covering the class 3 risk if the insured had made a proper disclosure; seventh, that the occupation in which the insured was engaged was more hazardous than his class 1 rating, and the principal sum of the policy should be prorated accordingly; and some other minor questions.

The main controversy in this case turns upon whether or not the insured made a full and fair disclosure to the agents of the defendant company on June 28, 1916, at the time the change-of-occupation rider was prepared and signed. It is claimed by the defendant that the insured fraudulently concealed and misrepresented the facts material to the risk regarding his occupation and duties as an employee of the Cutler-Hammer Manufacturing Company. Upon this the trial court found:

"(8) That subsequent to entering into said employment and on the 28th day of June, 1916, the said Charles Walter Warren, at the office which the defendant maintained in the city of Chicago, conferred with W. F. Lockwood, who was an agent and representative of the defendant and employed at its said office, and said H. V. Burrows; that on said occasion said Charles Walter Warren stated to said W. F. Lockwood and H. V. Burrows that he was employed as assistant to the president of the Cutler-Hammer Manufacturing Company, and that he was engaged in selling or exploiting a new electric gear shift manufactured by his employer; that he was in the office when in Milwaukee, and the rest of the time he was traveling; that he was trying to interest the large automobile manufacturers in the device; to get contracts with them to equip their cars; that he was given a car by his employer for his own personal use, which was equipped with the device, and that he used the car in driving around to visit automobile manufacturers; that if their engineers desired, they could take the car apart and do whatever they wanted to do with it; that said W. F. Lockwood then stated that he would prepare an indorsement

reading 'Office duties and traveling,' and that thereupon said Charles Walter Warren said, 'Well, I will have to leave it to your judgment. You are insurance men. I do not know anything about insurance matters . . . and whatever you say I ought to sign, after explaining my business, I will sign.' That at said time and place W. F. Lockwood, in the presence of said H. V. Burrows and with his knowledge and approval, prepared an indorsement in which Charles Walter Warren's employment is stated 'Assistant to President, Cutler-Hammer Mfg. Co. Office duties and traveling;' and that said indorsement was then signed by said Charles Walter Warren and attached to his policy of insurance."

A careful review of the evidence convinces us that the finding is in accordance with the great preponderance of the evidence. There is no classification set out in the manual of rates and classifications which accurately describes the work in which the insured was engaged. He certainly was not a dealer in automobiles. Neither was he a "salesman traveling, selling or operating, exhibiting or setting up machinery or implements or automobiles," in the sense in which those terms are generally and ordinarily used. The classification in which he was placed by the defendant's agents more nearly and more accurately describes the deceased's occupation than any other classification appearing in the manual of rates and classification. An electric gear shift is not an automobile; and the insured was something more than a mere salesman. While of course a part of his duties was to make contracts for the manufacture and sale of the electric gear shift, he was also to introduce it to manufacturers, engineers, and others having to do with the manufacture of automobiles. He was not a mechanic, and at times at least had with him a man who understood the construction and mechanism of the device which he was introducing. He was paid a salary of $12,000 per year. While some salesmen receive very large salaries, the amount paid him is somewhat indicative of the nature and importance of his

work. The use of the device upon different makes of automobiles must necessarily have involved many mechanical and manufacturing problems. The electric gear shift was not a machine, an implement, or an automobile. It was a device which might in the course of manufacture be installed in and made a part of an automobile. The insured fully and fairly stated the nature of his duties as an employee of the Cutler-Hammer Manufacturing Company and upon such statement the agents of the defendant company correctly placed him in the classification "Office duties and traveling."

The conclusion we have reached disposes of the other questions raised by the appellant. If he correctly stated his occupation and was correctly classified, there was no breach of the warranty, nor is there any basis for the claim that the prorate clause should be applied in this case, and the double-liability rider was properly attached.

While the trial court concluded as a matter of law from the facts found that the defendant was estopped from insisting that the classification made by its agents was not binding upon it, and that the defendant was likewise estopped from insisting that at the time of his death the insured was engaged in an occupation more hazardous than that stated in the indorsement, we do not reach and do not determine the question of whether or not, if the insured was classified by the agents of the defendant in a less hazardous occupation than that in which he was in fact engaged, the company would be estopped from claiming that the prorate clause, so called, should apply. We think upon all the evidence he correctly stated his occupation and was correctly classified.

By the Court.—Judgment affirmed.

PIERCE, Appellant, vs. WRIGHT, Respondent.

January 14—February 10, 1920.

Compromise and settlement: Guardian and ward: Payment of compensation to guardian: Release by ward after majority: Action: Recovery on claim not the basis of the action.

1. Where a minor voluntarily paid to his general guardian $5,000 as compensation for services in prosecuting a claim against the estate of his mother, and after becoming of age made a demand for the return of the sum paid and later accepted $1,500 in full settlement of his demand, such settlement was binding on him, there being no evidence of fraud or overreaching on the part of the guardian.
2. In a ward's action, brought after becoming of age, against a guardian for the return of money he had voluntarily paid, while a minor, as compensation for the guardian's services, recovery cannot be had on an agreement between the ward and the defendant as trustee for the allowance to the ward of a certain sum in settlement of another transaction in relation to a separate and distinct trust.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

John Eli Pierce, father of the plaintiff, died April 20, 1902, leaving an estate of the value of $200,000 or more. In his will the defendant was appointed one of the executors and one of the trustees of the estate. He qualified as trustee and executor and performed his duties as executor until discharged, and performed the duties of a trustee until January, 1918. The estate of the father consisted of real estate situated in New Orleans and real and personal property situated in the city of Milwaukee. The trust being invalid under the laws of Louisiana, the real property situated in New Orleans passed directly to the plaintiff, who was a minor at the time of his father's death. Subsequently, upon the advice of the defendant, the plaintiff had a corporation organized which took over the property in New Orleans. Plaintiff became the owner of all its capi-

tal stock except the necessary qualifying shares. During the minority of the plaintiff his income from the Louisiana property was collected by his mother, who died testate on January 1, 1914, not having accounted for the amounts collected by her. By her will the defendant was made its executor, but, having knowledge of the claim which the plaintiff had against his mother's estate by reason of the collections and conversion of the income of the Louisiana property, the defendant resigned as executor of the estate of Mrs. Pierce, and was appointed guardian of the plaintiff, and as such brought suit against the estate of Mrs. Pierce. The other material facts necessary to the determination of the questions raised here may best be stated in the language of the trial court:

The plaintiff "voluntarily paid to the defendant, *Arthur T. Wright,* the sum of $5,000 as compensation to said *Arthur T. Wright* for services rendered by said *Arthur T. Wright* as general guardian of the plaintiff in the prosecution of a claim against the estate of the plaintiff's mother, Margaret D. Pierce, which said claim was allowed the 7th day of August, 1915, at the sum of $12,208.06.

"(2) That the plaintiff became of age on June 22, 1916; that on the 7th day of July, 1916, the plaintiff executed and delivered to the defendant a release under seal acknowledging receipt of all moneys belonging to the plaintiff and held by the defendant as guardian of the plaintiff and full satisfaction of any and all claims and demands which the plaintiff had against the defendant as guardian. Such release was witnessed by one James J. Kerwin, who first acted as plaintiff's counsel in or about the months of May or June, 1916; that upon the allowance of the accounts of said defendant as the general guardian of the plaintiff the defendant made no claim for and was not allowed any compensation for services of such general guardian.

"(3) That on or about the 28th day of August, 1916, the plaintiff, by his counsel, James J. Kerwin, wrote a letter to the defendant demanding the return by the defendant to the plaintiff of said sum of $5,000 so paid by the plaintiff to the defendant; that thereafter, and for a period which continued from early in the month of September, 1916, to

the 9th day of December, 1916, negotiations were had between the parties in which the defendant was represented by his attorney, Carl B. Rix, and the plaintiff was represented by his attorney, James J. Kerwin; that during the course of such negotiations various offers and counter-offers were made by the respective parties for the purpose of disposing of the plaintiff's claim for the return of said sum of $5,000; that the counsel for the defendant, Carl B. Rix, entertained, in good faith, the belief that serious doubt existed as to the right of the plaintiff to recover the full sum of $5,000; and believed, in good faith, that a court might determine such controversy in favor of the defendant, *Arthur T. Wright,* as to a substantial part of said sum of $5,000; that no fraud or misrepresentation was practiced on the part of the defendant or his counsel in the negotiations with the plaintiff and his counsel during said period; that on the 9th day of December, 1916, plaintiff's said claim was compromised and settled for the sum of $1,500, which was paid by the defendant, and the plaintiff, against the advice of his counsel but without any procurement on the part of the defendant or the defendant's counsel, executed and delivered to the defendant a release under seal, which said release was witnessed by the plaintiff's said counsel; that at the time of the execution of said release the plaintiff understood the full purport and meaning thereof and was under no duress."

There was judgment in favor of the defendant dismissing the plaintiff's complaint, from which the plaintiff appeals.

Adolph Kanneberg of Milwaukee, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

ROSENBERRY, J. Upon this appeal there are but two questions for determination. First, Does the evidence sustain the findings of the trial court? and second, Do the findings sustain the judgment?

It is immaterial whether the defendant did or did not do many of the things alleged in the brief of counsel; if the set-

tlement made on the 9th day of December, 1916, was a full, fair, and complete settlement, it must stand unless set aside for fraud or mistake. Whatever the circumstances were under which the plaintiff was induced to make payment of the $5,000, the confidential relationship existing at the time of the payment was at an end at the time of the settlement. There is no allegation of fraud or mistake in reference to the settlement. The plaintiff was twenty-one years of age, and there is no claim that he was not fully competent to transact business upon his own account; in addition to which he had the advice and counsel of an attorney of his own choice. He was not under the influence or subject to the domination of the defendant in any way or to any extent, so far as the settlement was concerned; in fact it appears that the whole transaction in regard to the settlement was carried on at arm's length through the attorneys for the respective parties, and the conclusion of the trial court that the cause of action set out in the complaint was compromised, settled, released, and discharged by the plaintiff upon sufficient consideration is the only conclusion which can be reached upon the facts as found by the trial court, and the findings are amply sustained by the evidence.

We refer to one other matter, for the reason that it is argued that it ought to be considered part of the settlement. According to the laws of Louisiana the plaintiff became of age and capable of contracting when he reached eighteen. He thereafter organized the Pierce Investment Company to take over the real estate situated in New Orleans. Subsequently the defendant advanced to the plaintiff considerable sums of money, and finally purchased the stock of the Pierce Investment Company from the plaintiff for the benefit of the trust fund in his hands, for $18,000. During the time that the negotiations for the settlement of the plaintiff's claim against the defendant were pending the plaintiff also set up the claim that this transfer was illegal, because, while he was of age in Loui-

siana, he was not of full age and capable of contracting in Wisconsin. In order to settle this matter and dispose of any defect in the defendant's title, it was suggested by his attorney that the purchase price be increased from $18,000 to $21,000, and that a new transfer be executed by the plaintiff, who was at the time more than twenty-one years of age. The arrangement was accordingly entered into. The question of the defendant's liability or relation to the trust fund is not before us. If any cause of action exists by reason of the payment of the $3,000 increase in the purchase price of the stock, it is a matter which has to do with the defendant's duties as trustee, and the amount cannot be recovered by the plaintiff in this action. As to the claim for the return of the $5,000 set up by the plaintiff's complaint in this action, the plaintiff either settled and compromised the claim or he did not. If he did, as the trial court held, the defendant is not liable to him therefor. If the defendant misappropriated funds belonging to the trust fund (and we express or intimate no opinion as to that), he cannot be held liable therefor in this action.

By the Court.—Judgment affirmed.

The following opinion was filed March 8, 1920:

ESCHWEILER, J. (*dissenting*). The defendant was the lifelong friend of plaintiff's father, was appointed by him executor of his will without bond, and subsequently became the trustee of his large estate. He was the friend for many years and adviser in business matters of plaintiff's mother, consented on her urgent request to act as executor of her estate, and was relieved by her from the giving of any bond as such. Defendant knew the plaintiff from birth, was treated as a trusted friend and adviser, and knew thoroughly the plaintiff's disposition, character, and incompetency in financial matters.

Knowing all the time of the fact of the application by plaintiff's mother to her own use of the income from plaint-

iff's Louisiana real estate, the defendant remained silent as to such situation until after his appointment as executor of the mother's estate. When differences arose between himself and the half-sister of plaintiff who was interested in that estate, defendant first urged an immediate settlement of that estate so as to cut off the filing of this very claim on behalf of plaintiff, and, being disappointed in such efforts, then resigns as such executor and forthwith has himself appointed guardian of the plaintiff for the only purpose of filing this claim. The claim is allowed for $12,000, but is, from the record before us, not collectible to even one half of its face value.

Immediately after plaintiff's marriage, when he is but eighteen years of age, defendant takes a written statement from plaintiff and his wife purporting to release defendant from any liability for advances he might make to the plaintiff pending his minority, and over and above the annual income of the estate. With this agreement as apparent protection and yet knowing the unfortunate inability of plaintiff to handle his financial matters with any sort of reasonable care, the defendant advances within four years, on his own responsibility and without any order of the court, to this boy, $21,000 (including the $5,000 concerned herein) over and above the income of $19,000 properly paid for that period, so that for such period the defendant is assisting or permitting the plaintiff to squander at least $10,000 a year.

It was while breaking bread with the plaintiff that defendant suggests the filing of this claim, giving the plaintiff to understand that defendant alone is possessed of knowledge which would make such a claim enforceable. Plaintiff proposed that defendant should have a quarter or a third of such claim if it could be successfully prosecuted, and to this the defendant made no answer. Subsequently the matter was brought up again, and, as stated by plaintiff, he gathered from defendant's manner that the proposed allowance was too meager, and then, with the spendthrift extravagance that defendant so freely criticised in all other transactions

of the plaintiff than this one, suggested that the claim should be shared by the two equally. The defendant at this time neither chides the plaintiff for his extravagance nor refuses to be its beneficiary, but coyly yields. Subsequently, and when appeal in the matter is threatened and while it is yet uncertain as to how much, if anything, will be realized thereon, and shortly before the plaintiff attains his majority, defendant draws two checks of $2,500 each, being part of an extra advancement he is about making to the plaintiff out of the trust fund, has him indorse these two checks, and they are immediately applied to defendant's own personal account. These make the $5,000 which he asserts he was entitled to receive from his ward for his services as guardian. The prosecution of this claim was substantially all there was to the guardianship proceedings. It involved legal questions almost entirely, and these were presented by attorneys who, it appears, were paid less than $500 for their services. The record before us is ample, in my judgment, to warrant the assumption that for defendant's services in connection with the filing of the claim against the mother's estate $500 would have been an extravagant compensation to defendant. Had the facts been disclosed to the court at the time of the settlement of the guardianship matter, undoubtedly no compensation would have been allowed. *Guardianship of Abel,* 147 Wis. 467, 133 N. W. 583.

Shortly after the obtaining of the release from plaintiff in the guardianship matter a claim was made upon the defendant for the refunding of this $5,000 so taken by him from his ward. His concept of the ethical situation involved is vividly illustrated by his statement that when this demand was made upon him he felt "it was really a case of blackmail." He turns the matter over to an attorney, and from that time on holds himself carefully aloof.

There was then an important and crying necessity for over $6,000 to meet plaintiff's pressing obligations. De-

fendant had not as yet apprised the court in the trusteeship that he had bought, out of the trust fund, the interest of the plaintiff in the Louisiana corporation for $18,000. It was suggested that this might be increased by $3,000 and paid forthwith to plaintiff. It was, however, insisted that this and the payment of $1,500 by defendant should be kept separate, and when the arrangements were perfected they were kept separate so far as the face of the documents was concerned. They were, however, one and inseparable so far as the real substance of the situation between the parties was concerned; were being discussed at the same time; and the several documents were drawn and executed at the same time, as were the payments made.

If we look at the reality of things rather than the form, it is plain that the defendant takes out of the trust fund $3,000 for the purpose of assisting and disposing of that which he was pleased to call the blackmailing proposition of compelling him to refund that to which he had no equitable title and but a most unsubstantial legal title. For his alleged extraordinary services he had obtained an extortionate compensation, and from one with whom he could then make no binding contract.

I think this court should treat the transaction of the payment of the $1,500 out of defendant's own pocket and of the $3,000 out of the trust fund as an agreed settlement for the payment of $4,500, for a just and proper claim of $5,000, but that, it being an indivisible transaction with the defendant as an individual and not as trustee, he should be held to live up to it as an individual and be required to pay the $3,000 out of his own pocket instead of from the trust fund belonging to plaintiff. In that way no violence is done to the rule of law upholding settlements and, what in my judgment is far more important, the equitable doctrine upheld that one shall not be permitted to enjoy ill-gotten gains by breaching the elementary duties imposed upon those in whom have been placed such trust and confidence.

STARKEY, Respondent, vs. MURPHY, Appellant.

January 14—February 10, 1920.

Usury: Action of accounting by debtor: Complaint: Definiteness and certainty: Facts within knowledge of defendant.

1. Where plaintiff had borrowed numerous sums from defendant and had made repayment of various sums which he alleged amounted to more than the amount borrowed so as to constitute usury, but was unable to state with certainty the amount owing, and the facts were within defendant's knowledge, plaintiff was entitled to an accounting.
2. Where in an action for an accounting the complaint alleged that plaintiff was not in possession of all the facts necessary to set up the plea of usury with the definiteness and certainty ordinarily required and that such facts were within the knowledge of defendant, a demurrer to the complaint was properly overruled.

APPEAL from an order of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

The appeal is from an order overruling the demurrer of the defendant to the plaintiff's complaint. The complaint alleges that on or about the 5th day of December, 1906, the plaintiff borrowed of the defendant $25 and paid him usurious interest, amounting to fifteen per cent. a month, for the same; that thereafter, and up to the 7th day of April, 1915, he continued to borrow, from time to time, various sums of money from the defendant, to the amount and value, as he is informed and believes, of upwards of $50,000, a large portion of which sum defendant claims of plaintiff; that plaintiff has paid to defendant over and above what he has received from the defendant as loans. in usurious interest thereon, an amount greatly in excess of what defendant claims to be due him; that the reason why plaintiff is unable to make his allegations more certain is that the defendant has written the names of supposititious and other indorsers upon various checks; that he used various names which he insisted that plaintiff should draw

checks to; that he has brought suit against this plaintiff, in the name of his wife, when this plaintiff had no dealings with the wife; that he had plaintiff make checks payable to various persons, and notes at the same time, which were fastened together, and ultimately the checks were to be returned to plaintiff, but many of which were never returned to him; that he made use of various corporate names, when no such corporation existed; and so conducted himself that it is almost impossible for this plaintiff to figure out exactly the amount that is due him from defendant. The prayer is for an accounting between plaintiff and defendant, and for such other and further relief as to the court may seem just.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and from an order overruling the demurrer the defendant appealed.

The cause was submitted for the appellant on the brief of *Adolph Kanneberg* of Milwaukee, and for the respondent on that of *Joseph B. Doe* of Milwaukee.

OWEN, J. As a general rule, proper pleading requires that the plea of usury specifically set forth the terms and nature of the usurious agreement and transaction, and all the facts and circumstances in relation thereto. 22 Ency. Pl. & Pr. 431 and cases there cited; *Hull v. Augustine,* 23 Wis. 383. However, this is an action for an accounting, and the complaint alleges that plaintiff is not in possession of all the facts necessary to set up the plea of usury with that definiteness and certainty ordinarily required. That is the reason he desires an accounting. If he were in possession of the facts which would enable him to comply with the rule, an accounting would be unnecessary. He alleges, however, that these facts are within the knowledge of the defendant, and brings this action so that an account may be stated between them. It would seem that he is entitled to

an accounting, and that as the complaint is as definite and certain as he can make it, under the circumstances, the demurrer should be overruled.

By the Court.—The order appealed from is affirmed.

SCHUENEMANN, Respondent, vs. JOHN G. WOLLAEGER COMPANY, Appellant.

January 14—February 10, 1920.

Sales: Remedies of seller on buyer's breach: Sale to third party: Waiver.

1. Upon the buyer's breach of a contract for the sale of goods in the possession of the seller, the seller may (1) hold the property for the buyer and sue for the purchase price, or (2) sell the property as the agent of the buyer and recover the difference between the contract price and the fair market value upon resale as the liquidated amount of the damages, or (3) keep the goods and recover the difference between the contract price and the fair market value.
2. By selling an automobile to a third party upon the buyer's breach of his contract of purchase, the seller elected to waive the right to stand on its bargain and accept as the measure of its damages the difference between the price the buyer agreed to pay and the price received from the person to whom the machine was sold.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This is an action by plaintiff to recover $200 with interest from November 19, 1915, to April 6, 1916. It appears that the defendant company made a written contract with plaintiff to sell him a Studebaker motor car for $905. The writing signed by the parties is in the form of an order for a specified Studebaker car which defendant was selling in the city of Milwaukee. The date of the order was November 19, 1915, the price of the car $905, terms of payment $200 paid to defendant when order was signed, $205 to be paid about November 25th, balance of purchase price to

be paid by plaintiff on ten notes, which were to be given when car was delivered. The sale was not consummated pursuant to this writing, and on March 24, 1916, defendant sold the car to Dr. McRae for $865.

The plaintiff alleges and claims that defendant extended the time of the sales contract to March, 1916, and that he tendered performance of the contract of purchase within the time to which it had been mutually extended. The defendant alleges and claims that there was no extension of the time for the consummation of the sale as agreed on November 9, 1915, and that plaintiff is in default, and claims the right to recover the profits it would have realized had the plaintiff performed the contract, as damages for its breach. The evidence upon the question of an extension of time for the performance of the contract of sale from November, 1915, to March, 1916, by mutual agreement of the parties, and whether or not plaintiff breached this contract, is in sharp conflict. The trial court submitted these issues of fact to the jury for determination upon proper instruction. The jury rendered a special verdict awarding plaintiff damages in the sum of $152.63. The civil court awarded judgment in plaintiff's favor for this amount, with costs. The defendant appealed to the circuit court for Milwaukee county. The circuit court affirmed the judgment of the civil court. This is an appeal from such judgment.

The cause was submitted for the appellant on the brief of *Austin, Fehr, Mueller & Gehrz* of Milwaukee, and for the respondent on that of *Lines, Spooner & Quarles* of Milwaukee.

SIEBECKER, J. The appellant contends that the civil court erred in its ruling excluding evidence defendant offered to show as an item of its damage the profits it would have realized had the plaintiff consummated the purchase of the car as agreed by it and plaintiff in November, 1915. The evidence offered by defendant was for the purpose of

showing that it was a duly licensed agent of the Studebaker corporation, which manufactured this car; that this car was similar to the cars of this class then being sold in the Milwaukee market at a uniform price of $905, and the profit defendant would have realized had plaintiff performed his contract of purchase. The trial court held that the rule of damages applicable to this case, if plaintiff breached this contract, was the difference between the contract price of the car as sold to the plaintiff and the market price of the car at the time when the car should have been accepted by the plaintiff.

In the case of breach of contract for sale of goods it is well established that where the goods are in the seller's possession he may (1) hold the property for the vendee and sue him for the purchase price and thus secure the profits of his bargain; or (2) sell the property as agent for the vendee and recover the difference between the contract price and a fair market value upon resale as the liquidated amount of the damage; or (3) keep the goods and recover the difference between the contract price and the fair market value. *Haueter v. Marty,* 156 Wis. 208, 145 N. W. 775; *Berry v. Wadhams Oil Co.* 156 Wis. 588, 146 N. W. 783; sub. 3, sec. 1684*t*—64, Stats. (uniform sales act).

It is argued that defendant, under this rule of damage, is not made good the loss of profits it suffered as a result of plaintiff's refusal to perform the contract. It must be borne in mind that the cost of the car to defendant was the same whether it sold it to Dr. McRae or the plaintiff and that the jury allowed defendant the difference between the contract price and the price received from Dr. McRae. Furthermore, if defendant desired to collect the profits on its sale to plaintiff, the law offers the opportunity for it to hold the car for plaintiff and sue him for the purchase price, thus recovering the profits of the bargain. When defendant sold the car to another, as it did, it elected to waive the right to stand on its bargain and accept as the measure of

its damage for the breach of contract by plaintiff the difference between the price of the car plaintiff agreed to pay and the price for which the car was sold to Dr. McRae.

We find no error in the record.

By the Court.—The judgment is affirmed.

KOENIG, Respondent, vs. GEORGE LOGEMANN & SONS COMPANY, Appellant.

January 15—February 10, 1920.

Corporations: Authority of managing officers: Contract with broker to secure loan.

Where husband and wife and the wife's father owned all of the stock in a corporation, the husband as secretary and treasurer being the only person who took any active part in the management of the business (there having been no meeting of the directors for five years nor of the stockholders for a year), the corporation is bound by the act of the secretary in employing an agent to procure a loan for the corporation, although there had not been any express authority from the stockholders or directors to make such a contract.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Commission contract. The defendant is a corporation. The plaintiff is a real-estate agent. On October 5, 1917, the defendant employed the plaintiff to procure a loan of $27,000 upon certain property located in the city of Milwaukee, and agreed to pay a commission of two per cent. therefor. The plaintiff procured the loan and claims the amount of his commission, $540. The defendant alleges that the contract with the plaintiff was entered into by one Otto Logemann, secretary of the defendant company; that he was not authorized by the stockholders or directors to make such a contract, and the defendant has not ratified or confirmed it, but on the contrary has repudiated the con-

tract. From the judgment in favor of the plaintiff the defendant appeals.

The cause was submitted for the appellant on the brief of *Doerfler, Bender & McIntyre* of Milwaukee, and for the respondent on that of *Churchill, Bennett & Churchill* of Milwaukee.

ROSENBERRY, J.. The sole claim of the defendant is that its secretary had no authority to enter into the contract in question. It is claimed by the defendant that the facts in this case do not bring it within *Northwestern F. Co. v. Lee,* 102 Wis. 426, 78 N. W. 584; *Fernekes v. Nugent Sanitarium,* 158 Wis. 671, 149 N. W. 393; *Milwaukee T. Co. v. Van Valkenburgh,* 132 Wis. 638, 112 N. W. 1083; and *Swedish American Nat. Bank v. Koebernick,* 136 Wis. 473, 117 N. W. 1020. From the evidence it appears that Otto Logemann is not only the secretary and treasurer of the defendant company, but it also appears that he owns $6,000 par value of capital stock of the company, his wife owns $5,000 of such stock, and his father-in-law, Jacob Binzel, owns the remainder, $10,000; that the board of directors for many years has consisted of the three stockholders above named; that the father-in-law was president and the wife was vice-president; that neither of them has taken any active part in the management of the business; that no meeting of the board of directors had been held since 1912, and there had been no meeting of the stockholders since March 4, 1916, at which time a resolution was passed authorizing the secretary and treasurer to sign checks for any amount without their being countersigned by the president; and it appears that Otto was in effect and to all practical intents and purposes the corporation itself. Under the doctrine of the cases above cited the corporation was clearly bound by his act in entering into the contract for the benefit of the corporation.

By the Court.—Judgment affirmed.

KETTLE RIVER COMPANY, Respondent, vs. HASE and another, Appellants.

January 15—February 10, 1920.

Sales: Action for purchase price of paving blocks: Area laid not evidence as to number of blocks furnished.

1. In an action for the purchase price of pine paving blocks sold to the defendants, the evidence for plaintiff, consisting of depositions of its employees based on the plant records, is *held* sufficient to sustain a finding of the trial court as to the quantity of blocks delivered.
2. Evidence as to the number of square yards of surface laid with sandstone paving blocks as calculated by the city engineer under certain contracts which defendants had with the city was not competent to show the amount of blocks shipped by the plaintiff to the defendants, particularly in the absence of evidence of any witness having personal knowledge thereof that all the blocks received on the tracks were hauled to the respective streets upon which they were to be laid.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Modified and affirmed.*

Plaintiff brought action in the civil court of Milwaukee county against the defendant copartners, who were engaged in the street-paving business in the city of Milwaukee, to recover a balance alleged to be due on two separate contracts: one pursuant to which the plaintiff claimed to have shipped between July 10 and 15, 1914, 5,614.52 square yards of long-leaf yellow-pine paving blocks at the agreed price of $1.45 per square yard, sold f. o. b. cars at the plant of plaintiff in Illinois, upon which, after making credits for freight thereon paid by defendants and cash payments, there was a balance claimed to be due of $656.16; the other, pursuant to which plaintiff shipped between May 26 and June 17, 1914, 4,531 square yards of sandstone paving blocks f. o. b. cars at its plant in Minnesota at the agreed price of $1.75 per square yard, upon which there was

claimed to be due, after making allowances for freight and cash paid and certain other credits, a balance of $648.

The defendants answered admitting the making of the contracts and alleging that there had been shipped on account of the contract for pine blocks but 5,127 square yards instead of the 5,614 claimed by plaintiff, and that they had fully paid for the same.

As to the sandstone block contract, they alleged having received but 4,000 square yards instead of the 4,531 claimed by plaintiff, and that they had paid in full therefor.

Defendants counterclaimed for the sum of $2,400 alleged to be due for work, labor, and services by the defendants at the special instance and request of plaintiff, and demanded judgment therefor.

The civil court, where the case was tried without a jury, made findings of fact as to the first cause of action substantially in accordance with the complaint and that there was a balance due plaintiff of $656.16, and on the second cause of action that the plaintiff had shipped and delivered the number of sandstone blocks as claimed by it, and that the defendants were entitled to an additional credit other than that allowed by the plaintiff of $126 for work done by defendants for plaintiff in making repairs on street work done with plaintiff's material at some time preceding the contracts in question, and that there was a balance due plaintiff of $522 for such sandstone blocks, and ordered judgment which was thereupon entered for $1,432.10 on both causes, with costs and disbursements.

On appeal by defendants to the circuit court from this judgment the judgment of the civil court was affirmed, and from a judgment of the circuit court entered in accordance therewith defendants have appealed.

For the appellants there was a brief by *Wheeler & Witte* of Milwaukee, and oral argument by *Lyman G. Wheeler.*

For the respondent the cause was submitted on the brief of *Timlin & Dean* of Milwaukee.

ESCHWEILER, J. Defendants' contention in this case is that the judgment on the two causes of action in the civil court is without the support of competent proof as to the quantity of either pine paving blocks or of the sandstone blocks delivered on board cars at the respective plants of plaintiff.

Other than the testimony of one of the defendants as an adverse witness, the plaintiff's evidence rested entirely upon depositions taken on its behalf of certain officers and employees of its general office and its quarry in Minnesota, taken there, and officers and employees connected with its Illinois plant, taken at St. Louis. The direct examination of such witnesses was conducted by local counsel other than those here. No appearance was made by defendants at the taking of the depositions in Minnesota. They did appear and cross-examine at St. Louis.

As to the pine paving blocks, the testimony was quite explicit as to the manner of doing the work and computing the quantity in the various shipments. Records were kept by various employees as to the size of the timbers that were sawed up into blocks and of the number of blocks that went into the respectively numbered cages or containers that were used to hold such blocks when they were placed in the required creosote mixture; that the whole work was done under the inspection of a representative of the city of Milwaukee, with whom the defendants were under contract to do the paving with these blocks. The superintendent or auditor of the plant testified that accurate records were kept and checked over from time to time by him and that he personally looked after such supervision and checking, and he produced the records kept in that manner showing the identifying number of each such cage or container and the number of blocks alleged to be contained therein. In response to questions on cross-examination he stated that the figures in such records which were the basis of the bills rendered and judgment, although they were not in his hand-

writing, yet were subject to his audit and were at the time verified by him as being correct.

With considerable reluctance we are constrained to hold that there was under the testimony as to this cause of action a sufficient *prima facie* showing of the amount claimed by plaintiff and sufficient to support the conclusion arrived at by the two courts below.

As to the sandstone blocks, statements were rendered from the local office at the quarry to the head office at Minneapolis as to the number of blocks alleged to be loaded into each of the respective cars, about twenty-four in number, used in this shipment. From such reports the bookkeeper at Minneapolis made up the statements for each shipment, taking the total reported number of blocks in each car and dividing by twenty-three, it being contended, and there is testimony by one of the defendants and one of their witnesses to the same effect, that twenty-three is the standard number of such paving blocks required to cover one square yard of street surface. Upon such computation the amount due at the agreed price was computed, and plaintiff paid on such statements from time to time during the progress of such shipment. Bills of lading were also sent of the shipments, containing the weights on each carload both of the pine blocks and the sandstone, which respective weights agreed substantially with those reported to the defendants by the railroad company upon the arrival of the cars at Milwaukee. But no witness testified with knowledge as to the number of blocks actually loaded in each such car, nor that they were of the average or standard size, or that the weights of such shipments were such that they would result in a specified number of square yards of either kind of material.

Defendants contended that according to the custom in the city of Milwaukee in buying such material and doing such work, such material was to be paid for upon the basis of the amount of the number of square yards of surface laid

with such material as calculated by the city engineer on the work done by such contractors pursuant to their respective contracts. Such basis of computation, however, was not allowed by the trial court, and we think properly in view of the record, and particularly so where there was no competent evidence by any witness having personal knowledge thereof that all the blocks received on the tracks at Milwaukee were hauled to the respective streets upon which they were to be laid; and the point is not seriously urged here by appellants.

There was therefore no competent evidence on behalf of plaintiff in regard to the sandstone blocks to warrant the conclusion arrived at by the courts below that the quantity actually delivered on the cars in Minnesota was the amount for which the plaintiff rendered its statements. There is other testimony, however, in the record that will support the finding of the trial court to all of the amount claimed by plaintiff except 123.70 square yards of the sandstone.

The city engineer testified that there were laid on the street upon which the standstone blocks were to be used 3,957.29 square yards. Defendant *Hase* testified that in addition to the work on the street he used these sandstone blocks for paving three private driveways. He testified that the quantity used on these was forty-three yards and there is other testimony to support such estimate, but by a letter of June 13th, just before the final shipment under this contract, he reported to plaintiff that he had three private driveways in connection with this street which will take 100 yards.

Two extra carloads were sent by plaintiff pursuant to order of defendants at just about the time of the completion of the work. They were identified by car number by defendants, and, as billed to the defendants by plaintiff, appear to have had 174 and 166, respectively, or a total of 340 square yards. Out of these two cars defendant *Hase* testifies that he used about one quarter of one car, or, as he

states in another place, about thirty yards, to complete the street and driveways, and that the balance of such two cars he had hauled, pursuant to directions from plaintiff, to the yard of another contracting firm, who subsequently, it appears, paid the plaintiff for 186 yards and for which the defendants received a credit allowed in the account.

Defendants made a charge against the plaintiff for $28 on account of the hauling of the balance of the contents of these two cars to such other yard, and testified that such charge was on the basis of their necessarily paying for such hauling at the rate of eight cents per square yard. If this be correct, and the trial court might properly assume it was as against the defendants, it meant the hauling of 350 square yards. There might therefore be considered from defendants' testimony the following three items as having been actually received by them on this entire shipment, namely:

Sandstone blocks laid in street.....	3,957.29
Sandstone blocks three private driveways.....	100
Blocks hauled to other yard.....	350
	4,407.29

This is 123.71 square yards less than the amount found by the court, and at the contract price of $1.75 amounted to $216.49, and is the amount by which the judgment in the second cause of action must be reduced.

This would reduce the amount of principal and interest on the second cause of action as of the day of the judgment in the civil court from $635.97 to $372.91, and it should be so modified.

We find no sufficient ground in the record to change the ruling of the trial court in disallowing the item of $28 for hauling sandstone blocks as claimed by defendants.

By the Court.—The judgment below to be modified in accordance with this opinion, and as so modified affirmed. Appellants to have costs in the circuit court and here.

STAHL, Respondent, vs. BROECKERT, Appellant.

January 15—February 10, 1920.

Limitation of actions: Fraud: Action for money damages: Time of accrual of cause of action.

An action for a money judgment for damages caused by defendant's fraud in procuring plaintiff to sign a note and mortgage being purely a legal action, the cause of action accrued when the fraud was perpetrated and not when it was discovered by plaintiff; and sub. (7), sec. 4222, Stats., providing that a cause of action for relief on the ground of fraud in a cause cognizable in equity does not accrue until discovery of the fraud, does not apply.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The appeal is from an order overruling a demurrer to the plaintiff's complaint. This action was brought by the plaintiff against *William Broeckert,* Hugo J. Stahl, and Bertha Stahl to recover damages on account of fraud. The complaint alleges that the plaintiff is a widow sixty-five years of age, of German descent, and unable to read or write the English language; that the defendant *William Broeckert* is a notary public, versed in the drafting, execution, and acknowledgment of deeds, mortgages, and other legal documents; that prior to the 30th day of September, 1908, this plaintiff had agreed to purchase certain real estate from one Joseph H. Klein for $2,000. By the terms of the agreement plaintiff was to deliver to Klein a note for $1,000, her note for $850 secured by mortgage on the property, and the balance in cash; that on the 30th day of September, 1908, this plaintiff and said Klein and his wife met for the purpose of consummating the purchase of said premises; that the defendant *William Broeckert* was called to draft the necessary instruments; that said *Broeckert* knew that plaintiff was unfamiliar with the execution of legal documents and that this plaintiff then and there relied upon the honesty and integrity of said defendant *William Broeckert*

to properly make and prepare the necessary instruments; "that at that time and place the said defendant *William Broeckert,* being then and there, as this plaintiff is informed and verily believes, in league and collusion with the defendants Hugo J. Stahl and Bertha Stahl, and for the purpose of defrauding this plaintiff and for their own gain and benefit, wilfully and fraudulently procured the signature of this plaintiff to a certain note and mortgage for $800 purporting to be payable to one Peter Meinert; that, as this plaintiff is informed and verily believes, the said Peter Meinert had no knowledge of the fraudulent procurement of the execution and signing of the note and mortgage set forth herein, and, as this plaintiff is informed and verily believes, paid to the said defendants the sum of $800 as consideration for such note and mortgage in good faith;" that plaintiff did not intend to execute said note and mortgage to said Peter Meinert and that her signature was attached thereto without her knowledge, without knowledge on her part as to the nature and contents thereof, and through the fraudulent machinations of said defendant *William Broeckert;* that by reason of the fraudulent acts of said defendant the said note and mortgage became a valid and outstanding incumbrance upon the title of this plaintiff to the premises therein described, and that in order to remove such incumbrance plaintiff was compelled to and did on the 27th day of January, 1913, cause to be paid to the said Peter Meinert the sum of $781.14 to procure a release and discharge of said incumbrance. The prayer is for judgment against the said defendants for the sum of $900, together with the costs of the action.

To this complaint the defendant *William Broeckert* demurred on the ground "that it appears upon the face of said complaint that said action was not commenced within the time limited by law, that is, by sec. 4222 of the Wisconsin Statutes." The court overruled the demurrer, and the defendant *Broeckert* appeals from such order.

The cause was submitted for the appellant on the brief of *Hougen & Brady* of Manitowoc, and for the respondent on that of *Lorenz & Lorenz* of Milwaukee.

OWEN, J. It is conceded that this action is barred by sec. 4222, Stats., unless it was brought within six years after the cause of action accrued. The question is, When did the cause of action accrue? Plaintiff contends that this action is controlled by sub. (7), sec. 4222, which in effect provides that a cause of action for relief on the ground of fraud in a case which was on and before the 28th day of February, 1857, cognizable solely by the court of chancery, is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. The complaint alleges that the facts constituting the fraud were not known to plaintiff until on or about the month of July, 1912, and if said sub. (7) is controlling the action was brought before it was barred by the statute. It is well settled that said sub. (7) relates only to equitable actions and does not affect purely legal actions. This was made so plain in *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, that nothing further need be said. A consideration of the complaint herein discloses that this is an unadulterated legal action brought for the specific purpose of recovering a money judgment for damages occasioned by the fraud alleged. Such being its nature, the cause of action accrued when the fraud was perpetrated and not when it was discovered by plaintiff, and the statute of limitations had run thereon long before this action was commenced. The demurrer should have been sustained.

By the Court.—Order reversed, and cause remanded with directions to sustain the demurrer to the plaintiff's complaint.

SCHEUER and another, Respondents, vs. R. J. SCHWAB & SONS COMPANY (Intervening defendant), Appellant (MARSHALL & ILSLEY BANK, Garnishee defendant).

SCHEUER and another, Respondents, vs. R. J. SCHWAB & SONS COMPANY (Intervening defendant), Appellant.

January 15—February 10, 1920.

Garnishment: Amendment of affidavit: Intervention by creditor in prior garnishment action: Action: Waiving tort and suing on implied contract: Injunction against transfer of note: Payment.

1. A judgment creditor who had garnished a debtor's funds in a bank may intervene in an action brought against the debtor by another creditor who had garnished the same fund, and may present the debtor's defenses to the principal action, the judgment creditor having "such an interest in the subject matter of the controversy" under sec. 2610, Stats., as to require that he be made a party for the due protection of his rights.
2. A complaint alleging that a contract was entered into giving plaintiffs the right to sell defendant's goods in certain territory in consideration of a cash payment and the execution of a note; that plaintiffs were induced to enter into the contract by fraudulent representations; that plaintiffs, upon discovery of the fraud, tendered back the contract and demanded the return of the money and the note; and that defendant was insolvent, and asking that the transfer of the note be enjoined, that the contract be rescinded, and that plaintiffs recover the note and the money paid, states a cause of action for recovery on implied contract.
3. Injunction to prevent the transfer of the note is the appropriate remedy under sec. 2774, Stats., in an action by plaintiffs for recovery on implied contract brought after discovery of the fraud.
4. Upon discovery of the fraud plaintiffs could waive the tort and sue on an implied contract.
5. Under the liberal rule in favor of permitting amendments in proceedings and pleadings, an amendment of the garnishment affidavit from "express" to "implied" contract is proper.

APPEALS from orders of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed in part; reversed in part.*

The facts in the two above entitled actions are closely interwoven on their appeal to this court, and the rights of the appellant, *R. J. Schwab & Sons Company,* a domestic corporation, upon its petition to intervene in the principal and garnishee actions of the plaintiffs, *Joseph F. Scheuer* and *Harry Wagen,* are so intimately related to the purpose of each proceeding to intervene in the two actions that it is deemed best to state the two cases together to avoid useless repetition in the statement of the facts and the nature of the actions. This method of uniting the cases will sufficiently present the basis on which appellant relies for reversal of the separate orders made by the court in the principal and the garnishee actions.

The appellant, the *R. J. Schwab & Sons Company,* petitioned the circuit court to intervene in the principal and the garnishee actions wherein *Scheuer* and *Wagen* are plaintiffs. The grounds for such intervention are as follows: The *Schwab & Sons Company* commenced an action on November 8, 1917, in the civil court of Milwaukee county and obtained a judgment on October 17, 1918, against the Regal Oil-Gas Burner Company for $592.69. No appeal has been taken from such judgment by the Regal Oil-Gas Burner Company within the time prescribed by law. *Schwab & Sons Company* on November 8, 1917, also commenced a garnishee action against the Regal Oil-Gas Burner Company as principal defendant and the Marshall & Ilsley Bank as garnishee in civil court, which is still pending, and the bank has been ordered by the civil court to hold the sum of $766.40 belonging to the Regal Oil-Gas Burner Company. The civil court is prevented from directing the bank to pay the moneys it holds belonging to the Regal Oil-Gas Burner Company in satisfaction of the *Schwab & Sons Company* judgment because the money in the possession of the bank was also impounded by a garnishment action of *Joseph F. Scheuer* and *Harry Wagen* in the above entitled action against the Regal Oil-Gas Burner Company pending in the circuit court for Milwaukee county, and *Schwab &*

Sons Company cannot secure relief in their garnishment action against the Regal Oil-Gas Burner Company and the bank until this principal action and the garnishment action of *Scheuer* and *Wagen* in the circuit court against the same defendant and garnishee are brought to a final determination.

It appears by affidavit and notice in writing of the attorney of record of the Regal Oil-Gas Burner Company in the above entitled principal and garnishment actions of *Scheuer* and *Wagen* pending in circuit court that the Regal Oil-Gas Burner Company is practically a defunct and insolvent corporation and that it will not make any active defense in both this principal and garnishment action of *Scheuer* and *Wagen* in circuit court and therefore tenders to the *Schwab & Sons Company* the right to defend such action in the circuit court in place of the Regal Oil-Gas Burner Company.

The circuit court, upon the application of *Schwab & Sons Company,* ordered *Schwab & Sons Company* to be made a defendant in the garnishee action of *Scheuer* and *Wagen* against the bank pending in circuit court. Thereafter the *Schwab & Sons Company* as such party defendant in the garnishment action moved the court to dismiss this garnishment action of *Scheuer* and *Wagen* upon the ground that the cause of action of the principal action of *Scheuer* and *Wagen* against the Regal Oil-Gas Burner Company is not founded on contract, express or implied, as stated in the affidavit for garnishment required by the statutes. The circuit court denied this application to dismiss such garnishment action. From this order of the circuit court denying the dismissal of such garnishment action *Schwab & Sons Company* prosecute this appeal.

The circuit court denied the petition of *Schwab & Sons Company* to be made a party defendant in the above entitled principal action of *Joseph F. Scheuer* and *Harry Wagen* against the Regal Oil-Gas Burner Company to en-

able *Schwab & Sons Company* to present any defense in such principal action that the Regal Oil-Gas Burner Company may have and which the Regal Oil-Gas Burner Company refuses to litigate, to the end that *Schwab & Sons Company* may protect its right to the funds in the possession of the Marshall & Ilsley Bank, which it has impounded by garnishment to satisfy its judgment against the Regal Oil-Gas Burner Company above referred to. *Schwab & Sons Company* has taken an appeal from this order of the circuit court refusing to interplead it as a party defendant. These two appeals by *Schwab & Sons Company* will be considered together.

Henry E. Foclske of Milwaukee, for the appellant.

A. W. Foster of Milwaukee, for the respondents.

SIEBECKER, J. (1) Let us first consider the appeal from the order of the circuit court denying appellant's application to be made a party defendant in the principal action of *Joseph F. Scheuer* and *Harry Wagen* against the Regal Oil-Gas Burner Company. The appellant contends that the interest it acquired in the fund in the bank belonging to the Regal Oil-Gas Burner Company under its garnishment proceedings gives it an interest in the subject matter of the controversy of the principal action of *Scheuer* and *Wagen* against the Regal Oil-Gas Burner Company and that it cannot, under the facts and circumstances shown, protect such interest to the impounded funds in the possession of the bank unless it be made a party defendant to this principal action and be accorded the right to litigate any defense the Regal Company may have to the cause of action set forth in the plaintiffs' complaint. This claim of appellant is urged on the grounds that the Regal Company threatens to default in its appearance upon the trial of that case, and thus permit plaintiffs to obtain judgment without a trial upon the merits of the case and thereby enable the plaintiffs to prevent appellant from securing payment of its judgment

against the Regal Company out of the impounded fund of the Regal Company in the possession of the bank. *Schwab & Sons Company* claims the right to show the court that the plaintiffs, *Scheuer* and *Wagen,* are not entitled to recover upon their complaint in the principal cause of action and that their cause of action is of a nature and kind which does not legally entitle them to prosecute the garnishment action to secure satisfaction of any judgment they may obtain. The provisions of sec. 2610, Stats., are relied upon to sustain the *Schwab & Sons Company* in this claim. This section has been liberally construed to enable persons not parties to the action to be brought into the action for the due protection of their rights in the subject matter of the controversy. *Doherty v. Doherty,* 131 Wis. 375, 111 N. W. 478; *Swanby v. Northern State Bank,* 150 Wis. 572, 137 N. W. 763; *Carney v. Gleissner,* 62 Wis. 493, 22 N. W. 735.

The facts and circumstances of the instant case present a situation which discloses that, unless appellant is made a party to the principal action and is accorded the right to present the defenses of the Regal Company to plaintiffs' cause of action, it may be deprived of its right to the impounded fund in the possession of the bank. In contemplation of the provisions of sec. 2610 appellant has "such an interest in the subject matter of the controversy" which requires that it be made a party to the action for the "due protection" of its rights.

(2) The circuit court upon application of the appellant, *Schwab & Sons Company,* by order made it a party defendant to the garnishment action wherein *Scheuer* and *Wagen* are plaintiffs and the Marshall & Ilsley Bank is garnishee defendant. This was done for the purpose of enabling appellant to duly protect its interests as garnishee in the fund of the Regal Company in the possession of the bank. The court, however, denied appellant's application as such intervener to dismiss the garnishment action of

Scheuer and *Wagen* against the bank. *Schwab & Sons Company* prosecutes this appeal from that part of such order of the circuit court refusing to dismiss such garnishment action. It is contended that this garnishment action should be dismissed upon the grounds (1) that the cause of action alleged by *Scheuer* and *Wagen* in their principal action is one in equity, and that garnishment does not lie in aid thereof; and (2) that the complaint in the principal action does not state sufficient facts to constitute a cause of action.

The circuit court's refusal to dismiss the garnishment action is based on the grounds that the complaint in the principal action states a cause of action for recovery on implied contract, and that the affidavit on which the garnishment rests, stating that the principal action is one "to recover damages founded on express contract," can be amended and will be deemed to have been amended as charging that the principal action is one to recover damages founded on "implied" contract.

The complaint in the principal action charges in effect that plaintiffs in September, 1917, made a contract with defendant Regal Oil-Gas Burner Company, and, in consideration of paying such company $2,100, got the right to sell defendant's oil burners for stoves and furnaces within certain territory in this state; that the consideration was as follows: $1,650 in cash at the time the contract was executed and $450 by note; that plaintiffs were induced to enter into this contract through false and fraudulent representations of the defendant respecting the fuel consumption of the oil burners, and that defendant falsely and fraudulently represented that the oil fuel to be used in such burners would cost much less than coal fuel burners under like circumstances and conditions; that in fact the oil fuel consumed by such burners is much more costly than coal fuel, and that in fact these oil burners are of no real value whatsoever; that plaintiffs upon the discovery of such fraud

in October, 1917, tendered back the contract they had made with defendant and demanded the return of the money they had paid to defendant and the note delivered to it. The plaintiffs ask that defendant be enjoined from transferring the note if in its possession, and, if the note has been transferred, that plaintiffs recover the principal and interest due thereon. It is also alleged that defendant is insolvent. The relief demanded is recovery of the $1,650 paid, defendant's return of the note, that the contracts between the parties be declared rescinded, annulled, and canceled, and such other relief as may be just and equitable. The facts alleged in the complaint constitute a cause of action for the recovery of the money plaintiffs paid the defendant. The complaint also states sufficient facts to show that plaintiffs rescinded the contracts and tendered them back to defendant before action was commenced. In the light of these allegations the circuit court properly construed the complaint as stating a cause of action for recovery on implied contract. The relief demanded by way of injunction to prevent the transfer of the note is appropriate under sec. 2774, Stats., under the circumstances, to prevent the alleged threatened wrong respecting the subject of the action as tending to render the judgment in part ineffectual. The facts alleged in the complaint state in effect an action for the recovery of the money defendant received from the plaintiffs and hence is, in its nature and action, for money had and received.

True, the cause of action arises out of a tort, but plaintiffs may waive the tort and sue on implied contract. Upon the facts alleged the complaint must be held to state an action at law for damages. The recovery demanded also shows that plaintiffs are not seeking full recovery of their entire loss, but the amount defendant gained by payment plaintiffs made to it under the contracts specified in the complaint. These features characterize the complaint sufficiently to show that the recovery is sought on implied contract. *Norden v. Jones,* 33 Wis. 600; *Western Assur. Co.*

v. Towle, 65 Wis. 247, 26 N. W. 104; *Barth v. Graf,* 101 Wis. 27, 35, 76 N. W. 1100; *Huganir v. Cotter,* 102 Wis. 323, 78 N. W. 423.

We are of the opinion that the circuit court correctly held that plaintiffs were entitled to bring a garnishment action, and that under the liberal rule in favor of permitting amendments in proceedings and pleadings they are entitled to amend the affidavit for garnishment from "express" to "implied" contract.

It is therefore held that the part of the order of the circuit court refusing to dismiss the garnishment action of *Joseph F. Scheuer* and *Harry Wagen* against the Marshall & Ilsley Bank must be affirmed, and that the order of the circuit court refusing to make appellant a party defendant in the principal action of *Joseph F. Scheuer* and *Harry Wagen* against the Regal Oil-Gas Burner Company must be reversed, with direction to grant appellant's application to be made a party defendant in such action.

By the Court.—It is so ordered.

GIMBEL BROTHERS, Appellant, vs. KELLY and others, Respondents.

January 15—February 10, 1920.

Courts: Civil court of Milwaukee county: Appeal to circuit court: Partnership: Effect of failure to establish the fact of partnership: Dismissal of action.

In an action brought in the civil court of Milwaukee county against an alleged partnership, wherein the fact of partnership was not established, it was not error for the circuit court to direct the dismissal of the action, instead of sending it back for a new trial, under sec. 3072*m*, Stats., the judgment not being reversed because of the error in pleading or procedure, but because no cause of action as alleged in the pleadings existed in plaintiff's favor.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Partnership. The plaintiff commenced this action against the defendants as copartners to recover $498.07, the value of certain merchandise furnished by the plaintiff to the firm in connection with the operation of a business under the style of Marjory O'Farrell's Beauty Shop. The plaintiff had judgment in the civil court for the amount claimed, with interest and costs. On the hearing in the circuit court the judgment of the civil court was reversed, and the case remanded to the civil court with instructions to dismiss the complaint of the plaintiff. From the judgment of the circuit court the plaintiff appeals.

For the appellant there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter L. Gold.*

For the respondents there was a brief by *John S. Maxwell,* attorney, and *Frank T. Boesel;* of counsel, both of Milwaukee, and oral argument by *Mr. Boesel.*

ROSENBERRY, J. It is the claim of the plaintiff that the partnership of the defendants is established as a fact, and second, that, failing the establishment of the partnership as a fact, the defendants are by their conduct estopped from denying the existence of the partnership.

No useful purpose would be served by setting out at length the details upon which these claims are based. We have made a careful examination of the record, from which we are convinced that the circuit court was right in holding that there was no evidence of partnership as a fact, and no evidence of partnership by way of estoppel.

It appears that the defendant *Kelly* on behalf of the *King-Kelly Company* signed a guaranty or order for goods to be delivered to *Mrs. Farrell,* not exceeding $100. It is now claimed that the judgment of the circuit court in directing the dismissal of the action is erroneous because under the provision of sec. 3072*m,* Stats., the cause should have been sent back for a new trial. There was no error in this

case as to any matter of pleading or procedure. The judgment was reversed not because of error in the matter of pleading or procedure, but because no cause of action such as alleged in the pleadings exists in favor of plaintiff against the defendants. No other cause of action was pleaded or attempted to be pleaded. Therefore the circuit court was right in directing the dismissal of the action.

By the Court.—Judgment affirmed.

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ACCORD AND SATISFACTION.

Receiving and retaining check without cashing it.

1. Where plaintiff bought seed corn of defendant subject to test, which resulted in its rejection, but contracted to buy a less amount at a reduced price, and defendant sent plaintiff his check for the difference between the price of the corn and bags purchased and the amount previously received from plaintiff, the retention of the check by plaintiff, without cashing it (its tender back to defendant having been refused on a subsequent date), was not a completed accord and satisfaction as pleaded by defendant. *Frank v. Frost,* 353
2. Where plaintiff had an admitted claim against defendant for the difference between what he owed defendant and what had been previously paid, and no payment was made into court by defendant of the amount or any part thereof, and no attempt was made to comply with Circuit Court Rule XV or sec. 4266, Stats., as to tender, and no offer of judgment was made by defendant under sec. 2789, plaintiff's retention of the check merely defeated any claim for interest by him. *Ibid.*

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ACCOUNT STATED.

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2. The amendment of sec. 4096, Stats. 1917, by ch. 239, Laws 1919, relative to the power of the court to fix the time and place of examination, contemplates that it should be left in the discretion of the trial court to say whether a nonresident be examined in this state or at his domicile. *Ibid.*

Order refusing to suppress examination: Appeal.

3. An order refusing to suppress or prohibit an adverse examination under sec. 4096 is not appealable as a final order affecting a substantial right made in a special proceeding, under sub. (2), sec. 3069, since an adverse examination is not a "special proceeding." *Phipps v. Wis. Cent. R. Co.* 130 Wis. 279, and *Karel v. Conlan,* 155 Wis. 221, overruled. *Milwaukee C. Co. v. Flagge,* 492
4. Nor is such an order appealable as one continuing a provisional remedy under sub. (3), sec. 3069, since such an order does not "continue" the remedy by mere refusal to interfere with it. *Ibid.*

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1. A judgment of the circuit court is binding and conclusive upon all affected thereby until reversed on the appeal of those claiming it to be erroneous; and on the appeal of one judgment defendant the supreme court cannot, on reversal, disturb the judgment as to nonappealing defendants, though they file a brief alleging error. *Lezala v. Jazek,* 532

Same: Right of co-judgment defendant not appealing to a review.

2. Only the party whose interest is adverse to the appellant may secure a review of errors by giving the notice provided for by sec. 3049*a*. *Lezala v. Jazek,* 532
3. Sec. 3049*a* will not be construed so as to entitle a co-judgment defendant not appealing to a review of alleged errors against him without giving notice of application therefor to the party in whose favor the judgment was rendered; and if an appeal is not taken within thirty days after the appellant has served his notice, the right to a review is waived. *Ibid.*

Briefs: Function: Pertinent matters of record not alluded to in brief.

4. One of the appropriate functions of a brief filed in the supreme court is to direct the attention of the court to pertinent matters appearing in the record; and in the absence of any indication on the part of moving defendants that a notice under sec. 3049*a* for the review of an error affecting them was on file in this court, a search of the record for the discovery of such document on the part of the court was not to be expected. *Lezala v. Jazek,* 532

Review: Presumptions: Issues not submitted in special verdict.

5. On defendant's appeal from a judgment for plaintiff, disputed material questions of fact not submitted to the jury in special questions will be treated as having been found by the trial court against defendant, under sec. 2858*m*. *Arthur Koenig Co. v. Graham G. Co.* 472

Same: Presumption of correctness of judgment.

6. Where it appeared that the trial court, in directing the entry of judgment against a garnishee defendant, inserted an amount different from that stated in the findings of fact, and where it also appeared that the parties had agreed, on reargument of the case before the filing of findings, that the amount named in the judgment was the amount due under plaintiff's theory of the case, and where no motion was made to correct the error, it will be presumed on appeal that the judgment was right and that the error was in the insertion of the amounts in the findings. *Morgan v. Richter,* 111

7. A verdict approved by the trial court must be sustained on appeal if there is any credible evidence to support it. *Sharkey v. Shurman,* 350

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8. Permitting respondents' attorney to cross-examine his own witness is a matter peculiarly within the discretion of the trial court and cannot work a reversal of the judgment. *Branegan v. Verona,* 137

Same: Harmless error: Permitting incompetent witness to testify on uncontradicted matters. See TRIAL, 3.

9. Permitting a witness to testify as to a conversation with a deceased person, in violation of sec. 4069, was harmless where the facts covered by the testimony were shown by other competent witnesses whose testimony was uncontradicted. *Will of Lauburg,* 502

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10. In an action on an accident policy it was not error to allow plaintiff, after both parties had moved for a directed verdict and the jury had been discharged, to recall a physician, who upon re-examination of his records testified that he had been mistaken as to the date in his former testimony when he had informed plaintiff that the defective condition of his eye was caused by an accident, although the change of date had the effect of showing that plaintiff had given notice of the injury within the time required by the policy, where it was established as a verity that the physician was mistaken in his former evidence. The corrected evidence raising no issue of fact for the jury, the defendant was not prejudiced by its waiver of a jury trial. *Sheafor v. Standard Acc. Ins. Co.* 307

11. Where plaintiff crossed in front of a street car which she was intending to board and was struck by defendant's automobile, proceeding in the same direction as the street car, the sub-

mission in the special verdict of a question whether the speed of the automobile was more than ten miles an hour was not error misleading the jury on the matter of the driver exercising ordinary care, where through confusion the court directed the jury that they need not answer the question of speed in the event of answering that the driver was negligent, which the court corrected on his attention being called thereto, informing the jury that, if they answered that the driver exercised ordinary care, no answer would be required to the question as to the speed of the automobile. *Luethe v. Schmidt-Gaertner Co.* 590

12. Erroneous instructions on the measure of damages and the elements to be included were harmless as to plaintiff and not reversible error on his appeal, under secs. 2829, 3072*m*, where from an examination of the record the court is not convinced that if these errors had not occurred a more favorable result for the appellant might probably have resulted. *Braun v. M., St. P. & S. S. M. R. Co.* 10

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13. If the facts on which a judgment is predicated are substantially different from the allegations of the complaint, a former decision of this court on such complaint upholding its sufficiency is not *res adjudicata*, and the present record, on an appeal from a judgment for the plaintiff, must receive original investigation. *Sedgwick v. Blanchard,* 121

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14. On appeal by sureties on a guaranty bond, the error of the judge in refusing to find on the issue whether the bond was given for a past indebtedness, and, if so, whether any consideration moved from plaintiff to the sureties or to the principal, is ground for reversal and a new trial pursuant to sec. 2405*m*, Stats. 1917. *John A. Tolman & Co. v. Infusina,* 433

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1. Where defendant admits striking the plaintiff, he has the burden of proving the facts which show that he acted in proper self-defense. *Storma v. Wippich,* 188

2. The evidence being in sharp conflict as to who was the aggressor in a fracas, an instruction erroneously placing the burden of proof as to justification on plaintiff affected her substantial rights. *Ibid.*

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Dismissal of complaint: Effect.

Where the complaint in a principal action is properly dismissed, the attachment proceedings necessarily fall with it. *Rathmann v. Schwanz,* 459

ATTORNEY AND CLIENT. See MALICIOUS PROSECUTION. SPECIFIC PERFORMANCE, 8.

AUTOMOBILES.

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Negligence of driver: Violation of statute: Proximate cause.

1. The violation of secs. 1636—49, 1636—52*m*, and 1636—54, prohibiting any person from driving an automobile on the highway while intoxicated, without the owner's consent, or with the muffler open, is negligence *per se*, but not actionable negligence, unless some causal connection between such violation and the accident appears. *Steinkrause v. Eckstein,* 487
2. In an action for injuries sustained in a collision between two automobiles on a highway, whether the driver of the automobile in which plaintiff was riding was intoxicated, and whether such condition was a proximate cause of the accident, were questions for the jury. *Ibid.*
3. Where the jury found that the driver of an automobile failed to exercise ordinary care and that such failure was the proximate cause of plaintiff's injuries, questions as to whether the truck was driven at an excessive speed, and whether such speed was the proximate cause of the injury, became immaterial and superfluous in establishing actionable negligence. *Luethe v. Schmidt-Gaertner Co.* 590

Same: Driving automobile while intoxicated.

4. A driver of an automobile on a highway is not "intoxicated," within sec. 1636—54, unless his indulgence in intoxicating liquors is such as to result in an appreciable interference with the exercise of ordinary care in the management of the vehicle. *Steinkrause v. Eckstein,* 487

Same: Question for jury.

5. In view of sec. 1636—49, requiring that no automobile shall be operated recklessly or at a speed greater than reasonable and proper, which shall be so reduced at any street or cross-

road as to avoid danger of accident, the evidence in this case is *held* to present a question for the jury as to the negligence of the defendant driver, and not to warrant holding the driver not guilty of want of ordinary care as a matter of law. *Luethe v. Schmidt-Gaertner Co.* 590

6. Where the evidence was conflicting as to plaintiff's course of travel after observing the car, whether the car had come to a full stop before she crossed in front of it, and whether the truck driver had opportunity to observe that the car was slowing down, and as to the speed of the truck, the question of contributory negligence was for the jury. *Ibid.*

Contributory negligence of driver imputed to occupant.

7. One riding in an automobile is barred from recovering for injuries caused by the negligence of a third person if the driver of the automobile is also chargeable with negligence proximately contributing to the accident. *Steinkrause v. Eckstein,* 487

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Representation by officers: Release of mortgage by cashier: Liability.

Where plaintiff, knowing that the cashier of the defendant bank carried on a private loan business, purchased from him a thousand-dollar mortgage, receiving an assignment which he did not record and of which he and the cashier alone had knowledge, and afterwards the cashier, on receipt of $1,000 from the purchaser of the mortgaged premises, released the mortgage of record, paid the bank the amount of a second mortgage on the property, and deposited the balance to his private checking account, which he shortly thereafter overdrew, the bank was liable to the plaintiff for only the amount it received in satisfaction of its mortgage. *Swennes v. Citizens State Bank,* 197

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Restrictive indorsements: Title to note: Effect.

1. A payee's indorsement of notes to a bank "for credit account of" the plaintiff (payee's creditor) is a restrictive indorsement as defined by sec. 1676—6, conferring rights as fixed by sec. 1676—7. *Gulbranson-Dickinson Co. v. Hopkins,* 326
2. Indorsement of a note by the payee to a bank "for credit account of" the plaintiff transferred the whole title in the note to the bank for the benefit of the plaintiff. *Ibid.*
3. An indorsee under a restrictive indorsement takes a title qualified either as to person or use, and the delivery of the instrument gives effect to the indorsement, and it passes to the indorsee subject to all the restrictions imposed upon it. *Ibid.*

Same: Holder in due course: Defenses available.

4. Where notes were not accepted by plaintiff, creditor of the payee, and were not held as collateral by the bank to which they were indorsed, but were held as trustee for plaintiff's benefit, the bank, as indorsee, is within the provisions of sec. 1676—6, relating to restrictive indorsements, and the principle that an indorsee accepting negotiable paper as collateral security may be a holder for value does not apply. *Gulbranson-Dickinson Co. v. Hopkins,* 326
5. Where a note was not delivered to plaintiff, beneficiary of a restrictive indorsement, until after due, plaintiff did not become the owner and holder before maturity, and hence did not have a legal right to unite with his equitable title before maturity. *Ibid.*
6. While as between the payee and the plaintiff, its creditor, beneficiary of the payee's indorsement of notes to a bank, the proceeds of the note, when paid, were to be applied to plaintiff's use, plaintiff was not in any sense of the term an indorsee, and the instruments not being delivered to it until after due and it having no legal title thereto, the instruments in plaintiff's hands were nonnegotiable and subject to any defense which might have been made against them in the hands of the payee. *Ibid.*

Failure of consideration.

7. In an action on notes given for advertising matter and services in business promotion, the evidence is *held* sufficient to show a failure of consideration. *Gulbranson-Dickinson Co. v. Hopkins,* 326

Parties to action: Real party in interest: Trustees.

8. Under sec. 2605, providing that every action must be prosecuted in the name of the real party in interest, one for whose benefit a note was indorsed to another may maintain an action upon the note in his own name without joining the person to whom the note was indorsed; sec. 2607, providing that the trustee of an express trust may sue without joining the beneficiary, being permissive, and not requiring that the beneficiary be joined with the trustee. *Gulbranson-Dickinson Co. v. Hopkins,* 326

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Contract of employment: Exclusive agency: Validity.

1. An agreement by the owner of real property to pay a broker a commission "if the property is sold or exchanged before this

agreement is terminated, regardless of who negotiates the sale," is legal. *Greene v. Minn Billiard Co.* 597

2. Such an agreement obligates the owner to pay a commission upon sale of the property within the life of the agreement, though the purchaser was procured by the owner and not by the broker, the agreement being broad enough to require payment to the broker regardless of who procured the purchaser. *Roberts v. Harrington,* 168 Wis. 217, distinguished. *Ibid.*

Same: Parties to agreement: Vendor of property.

3. The former owner of a farm, who retained a substantial interest in it, though he had previously conveyed the farm to his son, first taking a mortgage back but later releasing the mortgage and accepting the son's personal note, could lawfully contract to pay a broker a commission if he should procure a purchaser for the farm, the son becoming too ill to work it so that it was necessary to sell. *Buroff v. Bergmann,* 316

Same: Consideration: Detriment to broker.

4. A complaint alleging that a broker spent time and money in an effort to sell property shows a consideration moving since the execution of the agreement and before suit, and, so far as consideration is concerned, an action may be maintained even though the owner was not benefited, as it is sufficient that there was a detriment to the broker. *Greene v. Minn Billiard Co.* 597

Right to compensation: Principal unable to fulfil orders procured by broker.

5. Where a bottle manufacturing company, with knowledge that a broker employed to procure orders had negotiations pending, telegraphed the broker to discontinue soliciting orders, without referring to pending negotiations, the broker, being a sales agent only and having no managerial responsibilities, upon consummation of the pending negotiations was entitled to compensation for procuring the orders, though the company could not fill them. *Arthur Koenig Co. v. Graham G. Co.* 472

Same: Procuring cause: Question for jury.

6. Where a broker is employed to secure a purchaser for a farm, no price being fixed by the seller, and the broker introduces or refers the seller to one with whom the latter makes a deal, he is entitled to his commission, where it appears that his act in bringing the seller and purchaser together is the efficient procuring cause of the sale. *Buroff v. Bergmann,* 316

7. In a broker's action for commission for having brought the defendant and the buyer together, the question whether the broker was the efficient procuring cause of the deal finally consummated was, under the evidence, for the jury. *Ibid.*

8. The trial court could not say as a matter of law that suspension, followed by renewal within a month, of negotiations between the seller and a buyer procured by plaintiff, resulting in the consummation of a deal which, though not exactly, was substantially the deal under consideration when negotia-

tions were suspended, eliminated the broker as the efficient procuring cause of the sale. *Ibid.*

Same: Knowledge of principal of purchaser procured by broker.

9. The evidence in this case is *held* sufficient to justify a finding by the jury that the defendant had knowledge that the party to whom he sold had had prior negotiations with plaintiff, though plaintiff did not expressly state to defendant that such party was a prospective purchaser. *Buroff v. Bergmann.* 316

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CHAMPERTY AND MAINTENANCE.

Intermeddling in action: Defending action for another.

In an action for breach of a contract to purchase a motor truck, the court properly refused to dismiss an answer and counterclaim for money paid plaintiff, although another truck company, when selling defendant a truck, "agreed to assume the responsibility should any trouble arise from the cancellation of" plaintiff's order and furnished counsel to defend plaintiff's action, there being no showing of a wrongful supporting and officious intermeddling in the suit. *Rathmann v. Schwanz,* 459

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CHILD LABOR. See MASTER AND SERVANT, 2, 3.

CHILDREN. See PARENT AND CHILD.

CHOICE OF REMEDY. See ACTION. SALES, 1–3.

CIRCUIT COURTS. See APPEAL, 1. COURTS.

CITIES. See MUNICIPAL CORPORATIONS.

CITY COUNCIL. See MANDAMUS, 3, 4. MUNICIPAL CORPORATIONS, 1.

CIVIL COURT OF MILWAUKEE COUNTY. See COURTS, 1, 2, 8, 9.

CLAIMS.

Against counties. See COUNTIES, 3.

Against decedents. See EXECUTORS. TRIAL, 4. WILLS, 2, 3. WITNESSES.

CLASSIFICATION. See SOLDIERS' BONUS LAW, 3 (b).
CLASS LEGISLATION. See SOLDIERS' BONUS LAW, 3 (b).
CLERK OF CIRCUIT COURT. See MECHANICS' LIENS, 2.
CLOUD ON TITLE. See QUIETING TITLE.
CO-JUDGMENT DEFENDANTS. See APPEAL, 3.
COLLATERAL SECURITY. See BILLS AND NOTES, 4, 6.
COMMERCIAL PAPER. See BILLS AND NOTES.
COMMISSION. See BROKERS. CORPORATIONS, 1.
COMMON CARRIERS. See PUBLIC UTILITIES, 1. RAILROADS.
COMPENSATION for injuries. See WORKMEN'S COMPENSATION.
COMPETENCY of witnesses. See WITNESSES.
COMPLAINT. See APPEAL, 13. ATTACHMENT. BROKERS, 4. PAYMENT, 2. SALES, 6. USURY, 2.

COMPROMISE AND SETTLEMENT.

See CORPORATIONS, 5. GUARDIAN AND WARD.

Policy of law in regard to amicable adjustments: Improvident settlements: Fraud.

1. It is the policy of the law to encourage rather than discourage amicable adjustments of controversies; and while it frowns upon imposition and fraud in the procurement thereof and will protect the victimized therefrom, it will not relieve from merely improvident settlements. *Kessler v. Leinss,* 583
2. Where a minor voluntarily paid to his general guardian $5,000 as compensation for services in prosecuting a claim against the estate of his mother, and after becoming of age made a demand for the return of the sum paid and later accepted $1,500 in full settlement of his demand, such settlement was binding on him, there being no evidence of fraud or overreaching on the part of the guardian. *Pierce v. Wright,* 606

CONCURRENT JURISDICTION. See SOLDIERS' BONUS LAW, 2.
CONCURRING VERDICTS. See NEW TRIAL.
CONDEMNATION. See EMINENT DOMAIN.
CONDITIONAL FEE. See CONTRACTS, 10. DEEDS, 3.
CONDITIONAL SALES. See EVIDENCE, 3. SALES, 10. SUBROGATION, 2.
CONGRESS. See SOLDIERS' BONUS LAW, 2.
CONSIDERATION. See ALTERATION OF INSTRUMENTS. APPEAL, 14. BILLS AND NOTES, 7. BROKERS, 4. CROPS. EVIDENCE, 6. GUARANTY, 2. PARENT AND CHILD, 4. SPECIFIC PERFORMANCE, 6.

CONSTITUTIONAL LAW.

See COURTS, 1, 2, 4–7.

Concurrent power of state and federal governments. See SOLDIERS' BONUS LAW, 2.
Powers reserved to state. See SOLDIERS' BONUS LAW, 2.
Police power of state. See FOOD, 1.

Public purpose. See SOLDIERS' BONUS LAW.

Delegation of legislative power: Prohibited employments: Industrial commission. See WORKMEN'S COMPENSATION, 1.

The legislature, in prohibiting the employment of minors in dangerous and unhealthful occupations, had the power to determine which occupations and places of employment were dangerous or unhealthful or could delegate determination thereof to the industrial commission. *Squires v. Brown,* 165

Delegation of taxing power. See SOLDIERS' BONUS LAW, 4.

Aiding religious schools. See SOLDIERS' BONUS LAW, 16.

Lending credit of state. See SOLDIERS' BONUS LAW, 15.

Obligation of contracts. See CONTRACTS, 1.

Class legislation. See SOLDIERS' BONUS LAW, 3 (b).

Equal protection of laws: Inequality of burden. See SOLDIERS' BONUS LAW, 3 (a).

Due process of law. See SOLDIERS' BONUS LAW, 3 (e).

Submission of statute to people. See SOLDIERS' BONUS LAW, 6.

Secretary of state as auditor. See SOLDIERS' BONUS LAW, 5.

Validity of statute: Who may raise question. See WORKMEN'S COMPENSATION, 2.

CONSTRUCTION.
Of contracts. See CONTRACTS.
Of insurance policy. See INSURANCE, 6, 7.

CONSTRUCTIVE KNOWLEDGE. See MORTGAGES, 1.

CONTINUANCE. See ADVERSE EXAMINATION, 4.

CONTRACTS.

See ACCORD AND SATISFACTION, 1. ALTERATION OF INSTRUMENTS. APPEAL, 14. BILLS AND NOTES. BROKERS. FRAUDULENT CONVEYANCES. GOOD WILL. GUARANTY. LOGS AND LOGGING. PLEADING. PRINCIPAL AND AGENT. SALES. SUBROGATION. WILLS.

Validity. See CORPORATIONS, 1, 9. CROPS. DAMAGES, 1–4. ELECTRICITY, 1. FRAUDS, STATUTE OF. GAMING.

Same: Time of determination.

1. The validity of a contract is to be determined as of the date of its execution, and a contract valid when made cannot be rendered invalid even by legislative action. *Sheffield-King M. Co. v. Jacobs,* 389
2. Where it is claimed that a contract would tend to foster a monopoly, its validity must be determined as of the time when it was made and not as of the time when specific performance is sought. *Dells P. & P. Co. v. Willow River L. Co.* 19

Consideration. See ALTERATION OF INSTRUMENTS. APPEAL, 14. BILLS AND NOTES, 7. BROKERS, 4. CROPS. EVIDENCE, 6. GUARANTY, 2. PARENT AND CHILD, 4. SPECIFIC PERFORMANCE, 6.

Construction. See BROKERS, 1, 2. ELECTRICITY, 2, 3. EVIDENCE, 4, 6–9. GAMING. GOOD WILL. MASTER AND SERVANT, 1. VENDOR AND PURCHASER.

Same: Building contract: Items not disclosed in plans and specifications.

3. Under a contract for the erection of a courthouse the plaintiffs were not bound to furnish at their own expense, as a part of their contract obligation, sand and labor for necessary inside and outside filling, where the plans and specifications failed to disclose these items and they were not within the contemplation of the parties at the time of making of the agreement. *Tomlinson v. Ashland County,* 58

Same: Power of architects to construe contract. See COUNTIES, 1, 2.

4. While architects had the power to construe and define the intent and meaning of the plans and specifications made a part of a contract concerning all work within the contract, they had no power to construe the contract itself and determine what work was within or without the contract. *Tomlinson v. Ashland County,* 58

Discharge. See PAYMENT.

Performance: Excuse for delay: Subcontractors: Damages. See TRIAL, 5–7.

5. Delays in the doing of the work of a subcontractor, for which damages are claimed on the ground that they were caused by defaults of the general contractor, are *held,* upon the evidence in this case, not to have been shown to be the result of the exercise by the general contractor of a power, given to him in the subcontract, to suspend at any time the whole or any part of the work therein contracted for, without compensation to the subcontractor other than extending the time for completing the work. *Edward E. Gillen Co. v. John H. Parker Co.* 264

6. Nor, under other provisions of the subcontract,—including a provision to the effect that should the subcontractor be obstructed or delayed by the neglect or delay of any other contractor there should be an allowance of additional time to him for the completion of his work,—and under the evidence as to letters written by the subcontractor to the general contractor in regard to delays and hindrances to his work, can it be held as matter of law that the allowance of additional time was the sole remedy of the subcontractor for such delays. *Ibid.*

7. The subcontract in question having neither expressly provided for liability on the part of the general contractor for delays caused by it, nor expressly excluded its liability for monetary damages for such delays, the general rule applies that where labor and materials are to be furnished by the one party and to be paid for by the other, and the one furnishing such labor and materials is dependent to some extent upon the other

party performing his part or providing for the prompt performance by others of a portion of the work, there arises by implication an obligation of such other party, not only to refrain from interfering with or impeding the contractor in the performance of his work, but also to do all that is reasonably necessary in order to enable such contractor to perform the work; and for a failure in either respect damages can properly be awarded to the party so delayed or impeded. *Ibid.*

8. Although the subcontract in question did not make the defendant (the general contractor) a guarantor of the prompt performance by other subcontractors of their respective subcontracts, yet, the jury having been properly instructed that in order to find that defendant unreasonably obstructed or delayed the progress of plaintiff's work they must find that there was some direct interference by defendant or failure to do what it could reasonably be expected to do, under the circumstances, to see that there was no interference by other subcontractors with plaintiff's progress, and the defendant having made no attempt at the trial to separate the delays directly caused by itself and those due to the faults of the other subcontractors and to have the latter excluded from the consideration of the jury, and there having been beyond doubt some delays for which defendant should be held liable in damages to the plaintiff, this court cannot, upon the record on appeal, carve out from the general finding as to the amount of damages such delays as might have been excluded. *Ibid.*

9. For delays in the work of a subcontractor for pile-driving, due to the general contractor's wrongful insistence that such subcontractor was bound to remove certain old foundation walls, the general contractor was responsible and liable in damages. *Ibid.*

Breach: Termination of contract upon default: Effect. See COURTS, 9. DEEDS, 4.

10. Where a father agreed with his son to convey eighty acres of land to the son and eighty acres to a daughter if the son would take possession, farm the land, and support the father, and the contract provided that the failure of the son to perform any condition should render it void, a subsequent breach by the son, coupled with re-entry by the father, especially in view of the contract provision, put an end to the contract and all rights created by it in favor of the daughter. *Sedgwick v. Blanchard,* 121

Same: Making new contract after breach: Rights of beneficiary under original contract.

11. After the son's breach of the agreement the father had a right to negotiate again with the son; and the sister, excluded from any right in the land through the termination of the original contract and the making of a new one, cannot complain that the son and his wife should not be permitted to profit by their breach of the original contract. *Sedgwick v. Blanchard,* 121.

Same: Interest after breach. See INTEREST, 2.

Action: Judicial relief from harsh contract: Fraud.

12. One asking relief from a contract freely entered into, in the absence of fraud or overreaching, does not bring himself within the field of judicial relief by merely showing that the result of the contract is harsh and burdensome. *Sheffield-King M. Co. v. Jacobs,* 389

Contracts with state. See STATES.

Champertous contracts. See CHAMPERTY AND MAINTENANCE.

Gaming contracts. See GAMING.

Wife's contract. See HUSBAND AND WIFE. PARENT AND CHILD, 4.

Insurance contracts. See INSURANCE.

Enforcing specific performance. See COURTS, 3. SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE. See APPEAL, 11. AUTOMOBILES, 6, 7. HIGHWAYS, 4. MASTER AND SERVANT, 3. NEGLIGENCE, 5, 6. WORKMEN'S COMPENSATION, 8.

CONVEYANCES with intent to defraud. See FRAUDULENT CONVEYANCES.

CORPORATIONS.

See GOOD WILL. TRIAL, 7.

Sale of capital stock: Promotion expenses: Validity of agreement to sell stock on commission.

1. Although under sec. 1753 a corporation cannot issue its stock for any sum less than the par value thereof, it can pay promotion expenses incident to and necessarily incurred in the sale of the stock, and may compensate one who sells its stock by means of a contract to pay commissions of twenty-five per cent. of the amount sold. *Denis v. Nu-Way P. C. Co.* 333

Same: Action to recover price paid for stock: Fraud: Liability of officers.

2. In an action to recover the purchase price of corporate stock upon rescission of the contract of purchase for fraud and deceit, the question whether those interested in the corporation should have known that the product to be manufactured was inefficient for the purposes claimed is, under the evidence, for the jury. *Denis v. Nu-Way P. C. Co.* 333

3. If a stockholder was defrauded in the sale of stock to him by the president of the company acting as its selling agent for commission, the president and the company were both jointly and severally liable to him. *Ibid.*

Same: Remedies of defrauded purchaser.

4. One who was induced to purchase stock in a corporation through the false representations of its president, the company's agent to sell stock, had the right either to restore the original status, rescind the contract of purchase and recover back his money, or could offer to restore the stock, and, by keeping the offer good, sue in equity for rescission of the contract and recovery of his money, or could sue the presi-

dent or the company, or both, at law for damages resulting from the president's fraud. *Denis v. Nu-Way P. C. Co.* 333

5. The question whether a subsequent transaction, whereby the president of a corporation agreed to take back the stock from the purchaser, was a sale of the stock to him inconsistent with rescission of the contract of purchase, or was a mere adjustment of the purchaser's claim for fraud, is for the jury. *Ibid.*

6. Where a company's agent to sell its stock committed a fraud, the purchaser can recover the price of the stock on rescission for the fraud, despite his prior efforts to secure redress from the agent, who actually committed the fraud, his claim against the company being extinguished only so far as the agent had reimbursed him, unless the transaction with the agent amounted to a resale of the stock to the agent and an assertion of ownership and affirmance by the purchaser. *Ibid.*

7. On rescission of such contract of purchase for fraud and deceit, the purchaser should have been permitted to show that the defendant company had gone out of existence and was not doing business, the evidence having a bearing on the questions whether the company's product was meritorious and whether the purchaser sustained any injury from the misrepresentations made to him. *Ibid.*

Officers: Acts of managing officer: Authority to bind corporation. See BANKS.

8. Where husband and wife and the wife's father owned all of the stock in a corporation, the husband as secretary and treasurer being the only person who took any active part in the management of the business (there having been no meeting of the directors for five years nor of the stockholders for a year), the corporation is bound by the act of the secretary in employing an agent to procure a loan for the corporation, although there had not been any express authority from the stockholders or directors to make such a contract. *Koenig v. George Logemann & Sons Co.* 619

Compensation of officers and agents. See BROKERS, 5. DAMAGES, 5, 6, 8.

Purchase of other corporations: Distribution of stock: Remedy of dissenting stockholder.

9. Where a defendant corporation purchased all the stock of the C. company so as to control its supply of raw material, but the proceedings by the stockholders of defendant which resulted in a distribution of the stock of the C. company to the stockholders were had under a mistaken supposition that the transaction when completed would leave defendant in control of the C. company, equity will grant relief to a stockholder who did not ratify the proceedings, there having been no dividend declared and the distribution being inimical to the interests of the defendant corporation. *Hoberg v. John Hoberg Co.* 50

10. The rights of creditors, the state, or third parties not being involved, it was within the power of the stockholders of the

defendant corporation to make distribution to its stockholders of the shares of stock of the C. company which had been acquired by defendant, and no stockholder consenting thereto and participating therein and receiving his *pro rata* share can object on the ground that the act is *ultra vires*. *Ibid.*

11. Where plaintiff, a stockholder in the defendant corporation, after discovering that the distribution to defendant's stockholders of the stock of the C. company was inimical to the best interests of defendant, tendered back the stock received by her, it is *held* that she had not ratified the distribution and was not estopped to maintain an action to compel a return of the distributed stock to the treasury of defendant. *Ibid.*

Taxation of incomes. See SOLDIERS' BONUS LAW, 3 (d), 3 (f). TAXATION, 6–9.

CORRECTION OF TAX. See TAXATION, 3, 5.

COSTS.

See MECHANICS' LIENS, 6.

Nature: Not a part of cause of action.

1. The costs of an action are the creature of the statutes and not a part of the cause of action. *Squires v. Brown,* 165

Persons entitled: Recovery by plaintiff in part: Apportionment of costs.

2. In a minor's action against his employer for injuries and for wages, where the employer contested the claim for wages because of the minor's failure to allege emancipation, and agreed, upon the father's relinquishment of the right to wages, in open court, to recovery upon the cause of action for wages, the minor was entitled, under secs. 2918, 2920, 2789, to costs, notwithstanding the failure to recover for injuries, since there could be no apportionment of costs, although each party is successful as to part of the issues tried. *Squires v. Brown,* 165

COTENANCY. See TENANCY IN COMMON.

COUNTERCLAIM. See CHAMPERTY AND MAINTENANCE.

COUNTIES.

See WORKMEN'S COMPENSATION, 16.

Implied contract: Mistake of law by county agents: Requirement of extra work.

1. Where the insistence by a county, through its building committee and architects, that certain work not within plaintiffs' contract should be done by the plaintiffs as part of their contract required them to proceed with the work as they did or to refuse to proceed at all, thereby subjecting themselves and the county to damages and delay, a situation was created under which there arose an implied obligation on the part of the county to pay for the work. *Tomlinson v. Ashland County,* 58

Action by contractor for compensation: Architect's certificate as condition precedent. See CONTRACTS, 3, 4. INTEREST, 1.

2. Failure of architects, based on their mistaken view of the law, to give the certificates specified in a contract for the erection of a courthouse, is no bar to the contractors' right to recover. *Tomlinson v. Ashland County,* 58

Same: Presentation of claim: Unintentional rejection: Effect.

3. Where a claim of the plaintiff contractors not intended to be rejected was properly a part of another claim with which it was mingled at the time the bill was presented, and the building committee of the defendant county rejected the entire bill, part of which should have been allowed, the claim not intended to be rejected cannot be defeated on the ground that it had never been properly presented to the county board for allowance. *Tomlinson v. Ashland County,* 58

Purchase of land at tax sale: Limitation: County as trustee.

4. Where lands are sold for the purpose of enforcing special assessment liens and are bid in by the county, the certificates of sale when issued are not the property of the county but of the holders of the special assessment certificates; the county being merely a trustee and not an owner within the meaning of sec. 1182, Stats., which provides a limitation of six years from the day of sale upon all tax certificates except those issued to "and owned by" counties or municipal corporations. *U. S. Nat. Bank v. Lake Superior T. & T. R. Co.* 539

Terms of court. See COURTS, 3.

County boards: Power to issue bonds. See SOLDIERS' BONUS LAW, 3 (g).

COURT COMMISSIONER. See CRIMINAL LAW, 2.

COURTS.

Jurisdiction of courts. See ADVERSE EXAMINATION, 1. DIVORCE, 1, 2.

Supreme court: Power to confer jurisdiction on inferior courts.

1. Sec. 2405*m* (authorizing the supreme court, where the record shows that the real controversy has not been fully tried, or where justice has probably miscarried, to reverse, regardless of whether proper motions, objections, or exceptions appear of record, and remand the case for a new trial, directing entry of the proper judgment), does not give this court power to reverse a judgment of the circuit court and direct it to remand the case to the civil court of Milwaukee county with instructions to grant a new trial, since this court may not confer power upon inferior courts, their powers being derived from the constitution and statutes. *Defiance M. Works v. Gill,* 477

Same: Original jurisdiction of supreme court. See MANDAMUS, 2.

Circuit courts: Power of circuit court for Milwaukee county to order civil court to grant new trial.

2. The circuit court for Milwaukee county has no authority to order the civil court of Milwaukee county to grant a new

trial, since the power of the circuit court is limited to affirmance, modification and affirmance, or reversal and new trial in the circuit court, under sec. 28, ch. 549, Laws 1909. Its most liberal power to grant a new trial is conferred by sec. 2879, Stats., and is limited to motions made within one year from the verdict or findings, and does not apply to a motion made almost two years thereafter. *Defiance M. Works v. Gill,* 477

Same: Power of circuit court to consider and conserve welfare of child. See PARENT AND CHILD, 1–3.

Same: Terms: General term for one county special for another in same circuit.

3. An action to compel specific performance of a contract to sell lumber or pulp wood and to enjoin defendant from interfering with the plaintiff exercising its contract rights, properly triable in the county where it was begun, may be tried, under sec. 113.11, Stats., in another county of the same circuit at a general term of court; the general term for one county being a special term for the other. *Dells P. & P. Co. v. Willow River L. Co.* 19

Superior court of Dane county: Supervisory control by circuit court.

4. The superior court of Dane county, as created by ch. 136, Laws 1917, is an "inferior court" within the meaning of sec. 8, art. VII, Const., giving circuit courts "appellate jurisdiction from all inferior courts . . . and a supervisory control over the same." *State ex rel. T. L. Smith Co. v. Superior Court,* 385

5. Sec. 21, ch. 136, Laws 1917, providing that appeals from the superior court of Dane county, with certain exceptions, shall be to the supreme court, thereby depriving the circuit court for Dane county of such appellate jurisdiction, was within the legislative power notwithstanding sec. 8, art. VII, Const. *Ibid.*

6. The legislature has no power to take away from the circuit courts their "supervisory control" over inferior courts given by sec. 8, art. VII, Const., the function of such control being to compel inferior tribunals to act within their jurisdiction, to prohibit them from acting outside their jurisdiction, and to reverse their extra-jurisdictional acts. Such supervisory control is separate and independent from appellate jurisdiction. *Ibid.*

7. Sec. 21, ch. 136, Laws 1917, depriving the circuit court for Dane county of appellate jurisdiction from the superior court of Dane county in certain cases, did not and could not divest such circuit court of supervisory control over such superior court either directly or by implication. *Ibid.*

Civil court of Milwaukee county: Dismissal of action on review by circuit court.

8. In an action brought in the civil court of Milwaukee county against an alleged partnership, wherein the fact of partnership was not established, it was not error for the circuit court to direct the dismissal of the action, instead of sending it

back for a new trial, under sec. 3072*m*, the judgment not being reversed because of the error in pleading or procedure, but because no cause of action as alleged in the pleadings existed in plaintiff's favor. *Gimbel Brothers v. Kelly,* 637

Same: Dismissal of principal action in attachment proceedings: Appeal to circuit court.

9. A judgment of the civil court of Milwaukee county in dismissing the principal action commenced by plaintiff to recover damages for breach of contract included a determination of the issues in the attachment proceedings, and plaintiff's appeal from the judgment carried the attachment proceeding to the circuit court with the principal action. *Rathmann v. Schwanz,* 459

Effect of judgment. See APPEAL, 1.

Supreme court. See APPEAL.

Circuit courts. See COSTS.

County courts. See WILLS.

CRANBERRY GROWERS. See WATERS, 3.

CREATION OF DEBT BY STATE. See SOLDIERS' BONUS LAW, 15.

CRIMINAL LAW.

Criminal intent: Evidence offered by defendant: Conclusiveness.

1. While defendants in criminal cases are permitted to offer evidence as to their intent in the doing of a particular act, neither the court nor the jury is concluded by such evidence. *Essex v. State,* 512

Evidence: Perjury: Opinion evidence as to similarity of handwriting. See PERJURY.

2. In a prosecution for perjury, copies of an alleged forged receipt made by defendant at the direction of a court commissioner in an adverse examination under sec. 4096 were properly submitted to a handwriting expert and to the jury; and it was proper to receive the expert's opinion as to their similarity. *Lappley v. State,* 356

Instructions: Definition of crime in language of statute: sufficiency.

3. While ordinarily it is sufficient, in defining a statutory offense, to define it in the language of the statute, where the guilt or innocence of the defendant depends on the question of intent, and instructions are properly requested on the subject, they should be given. *Essex v. State,* 512

Same: Instruction invading province of jury.

4. An instruction which is plainly limited to certain material facts is not erroneous as charging that all facts necessary to prove the crime were undisputed. *Lappley v. State,* 356

Specific offenses.

False swearing. See PERJURY.

Perjury. See PERJURY.

Violation of automobile law. See AUTOMOBILES, 1, 4.

Violation of pure food law. See FOOD.

CROPS.

Agreement to raise and sell crop: Consideration: Mutuality.

An agreement to raise a four-acre crop of tobacco and deliver it to a designated person at a stated price per pound, not supported by any consideration moving to the signers either by way of money or other thing of value, or of promises, is a mere naked offer and not enforceable. *Jones v. Wixom,* 314

CUSTODY OF CHILD. See PARENT AND CHILD.

DAMAGES.

See APPEAL, 12. CONTRACTS, 7–9. CORPORATIONS, 4, 7. COUNTIES, 1. GAMING. SALES, 1, 2, 7, 8. SPECIFIC PERFORMANCE, 5. WATERS, 4.

Stipulated damages or penalty: Ease of ascertainment: Policy of courts.

1. Stipulated damages must appear to be grossly in excess of the actual damages, or have no relation thereto, before the court can say that the damages stipulated are a penalty. *Sheffield-King M. Co. v. Jacobs,* 389
2. The rule that in determining whether an amount agreed upon as damages was intended as liquidated damages or a penalty the expressed intention of the parties gives way to the equity of the particular case, applies only where damages are readily computable and where the agreed damages are largely in excess of the actual damages. *Ibid.*
3. Courts are now strongly inclined to allow parties to make their own contracts and to carry out their intentions, even where it would result in the recovery of an amount stated as liquidated damages, upon proof of violation of the contract, and without proof of the damages actually sustained. *Ibid.*
4. In a contract for the sale of flour to be manufactured, made one month after the declaration of war by the United States against Germany, a provision for liquidated damages for the buyer's breach, while allowing recovery of large damages, apparently grossly disproportionate to the actual damages, is valid, in view of the uncertainty of the market and the difficulty of fixing the actual damages. *Ibid.*

Measure of damages: Proof of damages: Expenses not caused by default of other party. See TRIAL, 1.

5. Where a corporate subcontractor was a going concern doing other work during the period in which it was performing its subcontract, and did not employ or retain the services of its officers particularly with reference to such contract, and did not actually pay them any more than it would otherwise have done during that year, it cannot recover, as damages on account of delays due to fault of the general contractor, the value of its officers' extra services rendered necessary by said delays. *Edward E. Gillen Co. v. John H. Parker Co.* 264

Same: Failure to object to improper items: Effect after judgment. See APPEAL, 12. CORPORATIONS, 7–9.

6. Where, in an action for damages on account of said delays, no proper objection was made at the trial to elements of damage which the jury were permitted to consider, this court cannot, on appeal, attempt to pick out, as improper, particular portions of such elements, some parts of which were proper. *Edward E. Gillen Co. v. John H. Parker Co.* 264

Same: Damage to trees. See EMINENT DOMAIN, 6.

7. The damage to the owner of land from an electric company's acts in cutting trees in excess of what was necessary is the difference between the value of the farm with the trees trimmed in the manner provided by the contract and its value with the trees cut down. *Brown v. Wisconsin-Minnesota L. & P. Co.* 288

Same: On condemnation of land. See EMINENT DOMAIN.

Reduction of damages: Election to modify amount or submit to new trial.

8. It appearing that there was substantial error in permitting the jury, against objection, to consider in assessing the damages the value of extra services of plaintiff's officers, a new trial on the question of damages is directed unless plaintiff shall elect to take judgment for the reduced sum remaining after deducting the amount which it claimed on account of such services from the damages found by the jury. *Edward E. Gillen Co. v. John H. Parker Co.* 264

Instructions on question of damages. See TRIAL, 1, 2.

Form of damage question in special verdict.

9. The trial court should have submitted in the special verdict the question relating to damages in the form requested by the plaintiff, viz.: "In the event that the plaintiff should be entitled to recover, at what sum should his damages be assessed?" instead of in the form submitted: "What sum would reasonably compensate the plaintiff for his loss and injury which was directly produced by the derailment of the train in question?" *Braun v. M., St. P. & S. S. M. R. Co.* 10

Interest as damages. See INTEREST, 2. TRIAL, 5.

DANGEROUS OCCUPATION. See CONSTITUTIONAL LAW. MASTER AND SERVANT, 2.

DEATH. See HIGHWAYS, 1, 4. WORKMEN'S COMPENSATION, 10, 13.

DEBTOR AND CREDITOR. See BANKS. BILLS AND NOTES, 1. CONTRACTS. CORPORATIONS, 10. FRAUDULENT CONVEYANCES. GUARANTY. INSURANCE, 9, 11, 13. MECHANICS' LIENS. MORTGAGES. PARTIES. PAYMENT. PRINCIPAL AND SURETY. SUBROGATION. TRIAL, 5–7. USURY.

DECEIT. See FRAUD.

DEDUCTIONS in income tax. See TAXATION, 8, 9.

DEEDS.

See ELECTRICITY. MORTGAGES. QUIETING TITLE. TRUSTS, 1.

Execution: Intent of grantor to make conveyance: Delivery to third person.

1. A finding by the trial court that a deed executed by a grantor to a third person, who immediately deeded to the grantor's wife, was made with the intention of conveying the property described in the deeds, is sustained where the evidence discloses that the grantor, being ill, wanted the conveyance made because he might die, and both deeds were delivered by the third person to the wife, although it appears that the deeds were not to be recorded until after the grantor's death. *Chaudoir v. Witt,* 556
2. Neither the recovery of the grantor and his use of the property as his own until he died many years later, nor the belief of both husband and wife that the title was in the husband, changes the legal effect of the transaction. *Ibid.*
3. The delivery of a deed in escrow or upon condition cannot be made to the grantee himself, and if so made it at once becomes absolute and divested of the supposed condition. *Ibid.*

Forfeiture upon trivial breach of condition: Remedy. See CONTRACTS, 10.

4. Where a son received conveyance of a farm from his father on condition that he should support the father, make payments aggregating $1,500 to certain named persons, make a stated yearly payment to the father, and cultivate and harvest two acres for him, and the son performed the contract to support for more than thirteen years, paid $1,150 of the $1,500 to the persons designated, and stood ready to pay the balance whenever a legal representative was appointed for a beneficiary who had died, a court of equity should not have declared forfeiture of title after a single failure to cultivate the two acres, but should have directed a money settlement for the breach. *Scholl v. Muscovitz,* 97

DEFECTS IN HIGHWAY. See HIGHWAYS.

DELIVERY. See BILLS AND NOTES, 6. DEEDS, 1–3. FRAUDS, STATUTE OF, 2.

DENIAL OF DUE PROCESS. See SOLDIERS' BONUS LAW, 3 (e).

DEPRECIATION. See EMINENT DOMAIN, 4.

DIRECTED VERDICT. See APPEAL, 10.

DIRECTOR GENERAL OF RAILROADS. See RAILROADS.

DIRECTORS of corporations. See CORPORATIONS.

DISCHARGE of surety. See PRINCIPAL AND SURETY, 1.

DISCRETION.

Of city council. See MANDAMUS, 3, 4.

Of court. See ADVERSE EXAMINATION, 2. APPEAL, 8. NEW TRIAL.

Of town clerk. See TAXATION, 1.

DISMISSAL OF ACTION. See ATTACHMENT. COURTS, 8, 9.
DISTRIBUTION of stock. See CORPORATIONS, 9–11.
DITCHES. See DRAINS.
DIVERSION of waters. See WATERS.
DIVIDENDS. See CORPORATIONS, 9. TAXATION, 6, 7.
DIVISION of estate. See DIVORCE, 3, 4.

DIVORCE.

Powers of court.

1. Courts, either of law or equity, possess no powers in divorce actions except such as are conferred by statute, and authority for any act or proceeding must be found in the statute. *In re Grbic,* 201

Same: Power to issue a writ of ne exeat in divorce action. See NE EXEAT.

2. Sec. 2348, authorizing the circuit court in divorce actions to do all acts necessary and proper in such actions and to carry its orders and judgments into execution, empowers it to issue a writ of *ne exeat* to prevent its judgment for alimony. when rendered, from becoming ineffective. *In re Grbic,* 201

Final division of estate: Property derived mediately or immediately from husband.

3. The plaintiff husband had $300 when he married, worked as a day laborer for three years, and became the possessor of different canning factories which prospered under his management and in which he invested his earnings as well as money borrowed. The defendant wife invested a $2,500 inheritance in one of the factories, and later the joint holdings of the parties were sold at a profit and the proceeds reinvested in properties which were held jointly by them. *Held,* that the property of the wife, except as to the $2,500, must be considered, for the purpose of division of the estate on divorce, as property mediately or immediately derived from the husband within the contemplation of sec. 2364, Stats. *Cram v. Cram,* 322
4. In view of the situation of the parties, the conduct of the wife, and the fact that the estate of the husband is less than $18,000, while that of the wife is in excess of $13,000, an award to the wife of $5,000 is reduced to $1,000. *Ibid.*

DRAINS.

Purpose of creation of drainage districts.

1. Under sec. 1379—11, Stats. 1917, drainage districts are created for the purpose of promoting the public health or welfare and for the drainage of land, and are invalid if created for the drainage of land alone. *Cranberry Creek D. Dist. v. Elm Lake C. Co.* 362

Same: Power of drainage district to maintain action. See WATERS, 3, 4.

2. In view of the broad powers expressly granted to drainage districts by sec. 1379—14 and of the duty of a drainage dis-

trict to drain land for the promotion of the public health and welfare, a drainage district can maintain any action to remove any unlawful obstruction to the full discharge of its duty; and it is immaterial that private property owners within the district may benefit by the action. *Cranberry Creek D. Dist. v. Elm Lake C. Co.* 362

3. Since a drainage district may maintain an action where it is essential to the full discharge of its duty and functions, it may invoke the invalidity of any defense thereto. *Ibid.*

Legislative grant to build canal: Construction: Compliance with terms of grant. See WATERS, 3, 4.

4. Persons granted the right, by ch. 265, Laws 1893, as amended by ch. 80, Laws 1895, to maintain and build a canal from Hemlock creek to Cranberry creek for the purposes of transportation, irrigation, and drainage, were not entitled to build a canal only part way and then discharge water from Hemlock creek into the Cranberry creek drainage district, they having made no honest attempt to comply with the conditions of the grant. *Cranberry Creek D. Dist. v. Elm Lake C. Co.* 362

DUE COURSE OF MAILS. See EVIDENCE, 2. INSURANCE, 17.

DUE PROCESS OF LAW. See SOLDIERS' BONUS LAW, 3 (e).

EASEMENTS. See ELECTRICITY.

EDUCATIONAL BONUS. See SOLDIERS' BONUS LAW.

ELECTION DISTRICT. See MANDAMUS, 4. MUNICIPAL CORPORATIONS, 1.

ELECTION OF REMEDIES. See ACTION. SALES, 1–3.

ELECTRICITY.

Right-of-way agreements: Title conveyed: Restrictions. See DAMAGES, 7. EMINENT DOMAIN, 6.

1. Where a contract for the sale of a fifty-foot strip of farm land to a power company provided that no towers were to be placed in front of the seller's dwelling house, that the land was to be used as a right of way for transmission lines, and that trees should be trimmed so as not to interfere with the lines, such restrictions on the use of the land, being reasonable and valid as not inconsistent with public interest or public policy, did not prevent the title conveyed from being a fee or turn it into a mere easement, the contract calling for a warranty deed of the land free and clear of all incumbrances. *Brown v. Wisconsin-Minnesota L. & P. Co.* 288

2. The restriction in the contract that trees should be trimmed "so as not to interfere with the lines," is *held* not to apply only to trees outside of the fifty-foot strip, there being but four of these on the owner's premises to which the language could possibly refer, while there were more than one hundred on the strip conveyed. *Ibid.*

3. The evidence establishing that a clearance of ten feet is necessary to prevent electricity from leaping from the wires to tree branches, the company had a right, under the clause per-

mitting it to trim the trees so as not to "interfere" with its lines, to trim them so that no branch was within ten feet of the nearest line. *Ibid.*

EMANCIPATION. See COSTS, 2.

EMINENT DOMAIN.

See ELECTRICITY.

Taking of land for railroad purposes: Change in street grades.

1. The raising or lowering of the surface of a city street pursuant to an order of the railroad commission under sec. 1797—12*e*, which directed separation of the railroad and street grades, in legal effect is not a mere change of grade by the municipal government, but a taking of land for railroad purposes by the railroad company, though a street grade has not been previously established and worked up to, and though the railroad commission directs that the city be responsible for damages to adjacent property. *Chicago, M. & St. P. R. Co. v. Milwaukee,* 77

Persons entitled to payment: Railroad condemning its own land for railroad purposes.

2. Notwithstanding an order of the railroad commission that the city assume responsibility for damages to adjacent property caused by the issuance or enforcement of said order, the city is not liable to the railroad company for damages to its freight houses resulting from the change of grade, because the order of the commission creates no new liabilities, but simply places on the city the duty of discharging a liability already existing, and there is no liability already existing when a railroad company condemns its own property for railroad purposes. *C., M. & St. P. R. Co. v. Milwaukee,* 77

Same: Increased use of switch track.

3. The owner of land in a street on which a switch track had long been in use is not entitled to damages for the increased use of the switch track resulting from the use of a new spur track constructed on such street. *Lippert v. C. & N. W. R. Co.* 429

Property damaged: Independent and separate parcels.

4. The owner of a small triangular piece of land taken by a railroad in the construction of a spur track can recover only for the depreciation resulting to the property from which the piece is taken, and is not entitled to damages for depreciation in value of other property wholly independent and separate from that actually taken. *Lippert v. C. & N. W. R. Co.* 429

Remedies of owner: Ascertainment of damages: Appeal: Action for damages.

5. Though, under sec. 12, ch. VII, of the Milwaukee city charter, made applicable by sec. 2, ch. 376, Laws 1901, relating to construction of viaducts, an appeal is provided from an assessment of damages and benefits, a landowner is not thereby deprived of an action for damages sustained by the construc-

tion of a viaduct where the city made no provision for the ascertainment of such damages and benefits. *Gross Coal Co. v. Milwaukee,* 467

Action of trespass: Consent to taking of land.

6. Where a landowner never consented to the cutting down of trees along the line of an electric power company, but vigorously objected, the principle that one who expressly or tacitly consents to the occupation of his land by a public utility cannot sue for trespass but must condemn, does not apply. *Brown v. Wisconsin-Minnesota L. & P. Co.* 288

EMPLOYERS' LIABILITY. See WORKMEN'S COMPENSATION.

EQUAL PROTECTION OF THE LAWS. See SOLDIERS' BONUS LAW, 3 (a).

EQUITY.

See COMPROMISE, 1. CONTRACTS, 12. CORPORATIONS, 4, 6, 7, 9, 11. COURTS, 3. DAMAGES, 2. DEEDS, 4. INJUNCTION. LIMITATION OF ACTIONS, 1. MORTGAGES. PAYMENT, 2. QUIETING TITLE. RELEASE. SPECIFIC PERFORMANCE. SUBROGATION.

A mistake of law does not always bar equitable relief. *Hoberg v. John Hoberg Co.* 50

ERROR. See APPEAL.

ESCROW. See DEEDS, 3.

ESTOPPEL. See CORPORATIONS, 11. INSURANCE, 14.

EVIDENCE.

Judicial notice: Standard grade of wheat: Relation of prices of other grades.

1. Judicial notice may be taken of the fact that No. 1 Northern wheat is one of the standard grades and that the prices of other grades have a direct, although perhaps a varying, relation to it. *Sheffield-King M. Co. v. Jacobs,* 389

Presumptions: Due course of mail. See INSURANCE, 17.

2. A presumption arises from proof of mailing of a letter that it was duly received, and this presumption is not conclusively rebutted by the testimony of the addressee that he did not receive it. *Reeves v. Midland C. Co.* 370

Same: Laws of sister state.

3. It must be presumed that the law of a sister state as to the rights of a seller against a buyer under a conditional sale contract and an indorser of the buyer's notes is the same as that of this state, in the absence of allegations and proof to the contrary. *Defiance M. Works v. Gill,* 477

4. In an action on notes which were payable in and were transferred in another state, there being no claim that the laws of such state were not the same as those of Wisconsin, the notes will be treated as if executed, delivered, and payable in Wisconsin, and indorsed there. *Gulbranson-Dickinson Co. v. Hopkins,* 326

Presumption from continued possession of land. See ADVERSE POSSESSION.

Presumptions on appeal. See APPEAL, 5, 6.

Presumption of dependency. See WORKMEN'S COMPENSATION, 14.

Presumption against negligence. See PHYSICIANS AND SURGEONS, 4.

Presumption of revocation of will. See WILLS, 11.

Presumption that state officers obeyed the law.

5. On *mandamus* to compel the audit of a claim of a contractor and the drawing of a proper warrant for its payment, under the particular facts a stipulation that there were at all times sufficient funds to the credit of the printing board to cover the cost of printing ordered is sufficient to show that there were funds also in the treasury to the credit of the various departments of the state government to which the printing was chargeable, in view of the presumption that state officers and agents obeyed the law and did not subject themselves to the penalty of sec. 20.75, Stats. 1917. *State ex rel. Cantwell P. Co. v. Hull,* 174

Parol evidence: Consideration of instrument under seal. See TRUSTS, 1.

6. Under sec. 4195, Stats. 1898, guarantors signing a bond which was under seal and recited a consideration were entitled to show want of consideration, the bond being given for a past indebtedness. *John A. Tolman & Co. v. Infusina,* 433

7. The negotiations and conversations between the parties leading up to and including the making of a written contract are not admissible evidence to contradict and vary it, where the writing plainly purports to contain the entire contract, in the absence of accident, fraud, or mistake of fact. *Rathmann v. Schwanz,* 459

Same: Proof of undisclosed principal.

8. If a writing is signed by a person who in fact acts as agent for another in executing the agreement, it may be shown by parol that it was signed for the undisclosed principal. *Rathmann v. Schwanz,* 459

9. Where a contract of sale of a motor truck was signed by plaintiff as agent for a truck company, the court properly rejected an offer to show by parol that plaintiff was in fact the contracting party. *Ibid.*

Weight and sufficiency. See ALTERATION OF INSTRUMENTS. APPEAL, 7. AUTOMOBILES, 5. BILLS AND NOTES, 7. BROKERS, 9. CONTRACTS, 5, 6. CRIMINAL LAW, 1. DEEDS, 1. ELECTRICITY, 3. FRAUD, 3, 4. HIGHWAYS, 2, 4. INSURANCE, 11, 13, 18. MASTER AND SERVANT, 1. NEGLIGENCE, 2–5, 7, 9. PERJURY, 3. PHYSICIANS AND SURGEONS, 3. SALES, 4, 5. TENANCY IN COMMON, 4. WATERS, 4. WILLS, 2, 11. WORKMEN'S COMPENSATION, 3, 4, 7, 10–14, 17–20.

Relevancy, materiality, and competency. See APPEAL, 9, 10, 12. AUTOMOBILES, 3. DAMAGES, 5, 6, 8. DRAINS, 2. EVIDENCE,

7, 9, 10. HIGHWAYS, 2. NEGLIGENCE, 3, 4. PERJURY, 2. TENANCY IN COMMON, 2, 3. TRIAL, 4. WILLS, 5–7, 9. WITNESSES.

Opinion evidence: Expert: Speed of automobile.

10. In a personal injury action, where plaintiff was struck by a motor truck, evidence that there were skid marks of the truck wheels on the street for a distance equal to the street crossing and other evidence showing long skid marks furnished proper grounds for an expert to give his opinion as to the truck's speed when the brakes were applied. *Luethe v. Schmidt-Gaertner Co.* 590

Same: Similarity of handwriting. See CRIMINAL LAW, 2.

Same: Conflict with positive testimony.

11. The opinion evidence of a physician could not raise a conflict with the positive evidence of defendant and another physician who reopened a wound that the facial nerve was not severed in performing an operation. *Finke v. Hess,* 149

Post-testamentary declarations. See WILLS, 6.

Contents of lost letter. See WITNESSES, 2.

Evidence in fraud actions. See FRAUD.

EXCHANGE OF PROPERTY. See RELEASE.

EXCLUSIVE AGENCY. See BROKERS, 1, 2,

EXECUTORS AND ADMINISTRATORS.

See TRIAL, 4. TRUSTS, 2. WILLS.

Property passing to representatives: Tax certificates.

1. A tax certificate is real property (*Eaton v. Manitowoc Co.* 44 Wis. 489, followed), and is not assets in the hands of an executor but passes to the heirs. *Madler v. Kersten,* 424

Claims against estate: Services rendered deceased's husband. See COMPROMISE, 2.

2. A claim founded upon services rendered to decedent's husband, also deceased, is unenforceable against the widow's estate where the husband's estate has been fully administered long prior to the widow's death. *Felz v. Estate of Felz,* 550

EXECUTORY SALE CONTRACTS. See SALES, 10.

EXEMPTION.
From execution. See HOMESTEAD.
From taxation. See SOLDIERS' BONUS LAW, 3 (b).

EXPERT TESTIMONY. See EVIDENCE, 10, 11.

EXTRA WORK. See COUNTIES, 1, 2.

FACTORS. See BROKERS.

FAILURE OF CONSIDERATION. See BILLS AND NOTES, 7.

FALSE REPRESENTATIONS. See CORPORATIONS, 4. FRAUD.

FALSE SWEARING. See PERJURY.

FEDERAL INCOME TAX. See TAXATION, 8, 9.

FEDERAL RAILROAD CONTROL ACT. See RAILROADS.

FIDUCIARY RELATIONS. See COMPROMISE, 2.

FINAL DIVISION OF ESTATE. See DIVORCE, 3, 4.
FINDINGS OF FACT.
By court. See APPEAL, 6. TRIAL.
By referee. See MASTER AND SERVANT, 1.
By industrial commission. See WORKMEN'S COMPENSATION.
FIRE DEPARTMENT. See MUNICIPAL CORPORATIONS, 2.
FIRE INSURANCE. See INSURANCE.
FIRES. See NEGLIGENCE, 2.

FOOD.

Police power of state: Regulation of manufacture and sale of food.
1. The enactment of the pure food law (secs. 4600 *et seq.*) was in the lawful exercise of the police power. *McCarthy v. State,* 516

What are "foods:" Preservatives.
2. A preparation composed of ninety-five per cent. boric acid and five per cent. common salt, advertised and intended to be used as a preservative in the canning of all kinds of fruits and vegetables, is a violation of sec. 4601*e*, Stats., prohibiting the sale of food containing boric acid, such preparation being "a food" within the meaning of sec. 4600, as amended by ch. 202, Laws 1909, providing that "all articles used or intended for use as ingredients in the composition" of food or "in the preparation thereof" shall constitute food. *McCarthy v. State,* 516

Offenses: Imitating butter: Intent: Definition of "yellow butter."
3. In order to establish the guilt of one accused of violating sec. 4607*c*, prohibiting the sale of oleomargarine in imitation of butter, it is necessary for the state to offer evidence tending to establish the fact that the article sold by the defendant was made with intent that the product, when completed, should be in imitation of yellow butter. *Essex v. State,* 512
4. This intent, or the fact of conscious imitation of yellow butter, may be inferred, in a prosecution under said sec. 4607*c*, from the fact that the oleomargarine sold was in imitation of yellow butter. *Ibid.*
5. The term "yellow butter," in sec. 4607*c*, prohibiting the sale of oleomargarine which is in imitation of yellow butter, means butter of that shade or color which is usually and ordinarily described as yellow, as distinguished from pale straw, light yellow, or any shade of yellow lighter than that usually and commonly referred to as yellow butter, such as is produced in the summer time. *Ibid.*

FORECLOSURE.
Of lien. See MECHANICS' LIENS, 4–6.
Of mortgages. See MORTGAGES, 2.
FORFEITURE. See DEEDS, 4.
FORGERY. See CRIMINAL LAW, 2.

FRAUD.

See ACTION. COMPROMISE. CONTRACTS, 12. CORPORATIONS, 2, 4–7. EVIDENCE, 7. FRAUDS, STATUTE OF, 1. GUARANTY. INJUNCTION. INTEREST, 3. LIMITATION OF ACTIONS, 1. PAYMENT, 2. PRINCIPAL AND AGENT. RELEASE. SALES, 9.

Disparity between price and value: Effect.

1. In an action for fraud in the sale of a farm, disparity between the price paid and the actual value is a fact to be considered by the jury in determining whether the plaintiff buyer relied on the defendant seller's representations and whether he should have discovered their falsity. *Olson v. Laun,* 106

2. Where the amount paid by the plaintiff for a farm which he purchased from the defendant was grossly excessive, that fact in itself was evidence of fraud by defendant. *Ibid.*

Reliance on representations: Evidence. See GUARANTY, 1. RELEASE. SALES, 9.

3. The evidence in this case—showing that the defendant had orally and by written advertisement represented that there were 160 acres of plow land on the farm, that he misstated its tax assessment, and that the plaintiff, in the hurried examination he gave the farm, was not able to determine the acreage under plow—supports the finding of the jury that the plaintiff had a right to rely on defendant's representations in regard to the number of acres of cultivated land. *Olson v. Laun,* 106

4. Under all the circumstances, findings of the jury that plaintiff was warranted in relying on the representations of defendant as to the amount of white oak timber on the farm and the amount of hay and pasture land and the farm's productiveness are *held* to be supported by the evidence. *Ibid.*

Waiver of fraud: Action for damages. See ACTION.

FRAUDS, STATUTE OF.

Leases for more than one year: Fraud: Part performance.

1. A parol agreement to permit parents to occupy certain premises during the rest of their lives was void under sec. 2304, requiring a contract of leasing for a period longer than one year to be in writing, and under sec. 2305 will not be specifically enforced where there has been no performance or fraud. *Ludwig v. Ludwig,* 41

Sales of goods: Delivery of part of goods: Effect.

2. An oral sale, as one transaction, of specified quantities of wheat and barley at different prices per bushel, was a single contract and, under sec. 2308, delivery of the wheat took the whole contract out of the statute of frauds. *New Richmond R. M. Co. v. Arnquist,* 130

FRAUDULENT CONVEYANCES.

Bulk sales law: Innocent purchasers: Successive sales.

1. Where plaintiff sold merchandise in bulk to C., who sold to P., who in turn sold to defendant K., who paid part cash and agreed to pay and afterwards paid the same creditors of C., not including plaintiff, whom P. had agreed to pay, there being no compliance with the bulk sales law (secs. 2317*c et seq.*) as to any of the sales, K., if an innocent purchaser for a valuable consideration from P., is not liable on a claim of plaintiff against C. This statute does not render an innocent purchaser for value from a first buyer liable to creditors of the first seller, nor affect his title to the property. *Prokopovitz v. Kurowski,* 190
2. Where K., who purchased for full value a stock of goods from P., did not know that C., from whom P. bought, was still indebted to plaintiff for the original purchase price, and K. protected and caused to be paid all known creditors of C., the sale to K. was not fraudulent as to the creditors of C., even though there was no compliance with sec. 2317*c*, requiring the list of creditors to be verified. *Ibid.*

FRAUDULENT REPRESENTATIONS. See FRAUD.

GAMING.

Contract providing for damages based on price of wheat on named exchange.

The fact that a provision for liquidated damages for the buyer's breach of contract for sale of flour to be manufactured was based on the market price of No. 1 Northern wheat at a named exchange, did not render the sale contract void as a gaming contract, in the absence of a showing that the parties did not intend to carry out the contract. *Sheffield-King M. Co. v. Jacobs,* 389

GARNISHMENT.

See APPEAL, 6. PARTIES.

Amendment of affidavit: Express to implied contract.

Under the liberal rule in favor of permitting amendments in proceedings and pleadings, an amendment of the garnishment affidavit from "express" to "implied" contract is proper. *Scheuer v. R. J. Schwab & Sons Co.* 630

GENERAL CONTRACTOR. See CONTRACTS, 5–9. COUNTIES, 2, 3. MECHANICS' LIENS, 4–6. TRIAL, 5–7.

GIFTS. See SOLDIERS' BONUS LAW.

GOOD WILL.

Breach of contract not to engage in similar business.

One who was the selling agent of a corporation and received as compensation fifty per cent. of the net profits, and to all intents and purposes was the active manager and backbone of the corporation, was "indirectly" engaged in such business, within the meaning of a contract of sale of a similar business

wherein he agreed not to again engage in such business, "directly or indirectly," and although he was not a stockholder of the corporation. *Crowley v. Ficks,* 143

GOVERNMENTAL FUNCTION. See SOLDIERS' BONUS LAW, 9.

GRANTS. See DRAINS, 4.

GUARANTY.

See APPEAL, 14. CONTRACTS, 8.

Failure of guarantee to notify guarantors of existing indebtedness.

1. Where a salesman's bond guaranteed the payment to his employer not only of all moneys collected by and advanced to him, but also of "any and all indebtedness now due" his employer from him, the employer's failure to inform the sureties that the salesman was already indebted to it at the time they signed the bond was not a fraudulent concealment where the employer had no communication whatever with the sureties before they signed. *John A. Tolman & Co. v. Infusina,* 433

Same: Consideration: Guaranty of past debts.

2. There must be a new consideration moving either to the principal or to the sureties, or to both, or a detriment to the obligee, for a bond guaranteeing the payment of a past indebtedness of the principal. *John A. Tolman & Co. v. Infusina,* 433

GUARDIAN AND WARD.

See COMPROMISE, 2. PARENT AND CHILD, 1–3.

Action by ward against guardian: Other transactions than those arising out of guardianship.

In a ward's action, brought after becoming of age, against a guardian for the return of money he had voluntarily paid, while a minor, as compensation for the guardian's services, recovery cannot be had on an agreement between the ward and the defendant as trustee for the allowance to the ward of a certain sum in settlement of another transaction in relation to a separate and distinct trust. *Pierce v. Wright,* 606

HANDWRITING. See CRIMINAL LAW.

HARMLESS ERROR. See APPEAL, 9.

HEALTH AND ACCIDENT INSURANCE. See INSURANCE, 12, 15, 18.

HIGHWAYS.

See AUTOMOBILES. EMINENT DOMAIN. NEGLIGENCE, 4, 5. TRIAL, 3.

Defective condition: Absence of barriers: Question for jury. See TRIAL, 3.

1. In an action against a town for damages for the death of plaintiffs' decedent, due to his automobile running off the bank of a turnpike, the question whether the absence of a railing or barrier rendered the highway unsafe is, under the circumstances, for the jury. *Branegan v. Verona,* 137

2. Almost innumerable circumstances, such as the topography of the locality, the development of the community, the standard of road construction therein attained, the amount and character of traffic, etc., are to be taken into consideration in determining whether a given condition renders a highway defective. *Ibid.*

Same: Reasonable anticipation of injury to traveler: Contributory negligence.

3. In order to satisfy the requirement of reasonable anticipation of injury to a traveler on a highway it is not necessary that the town board should have foreseen that the accident which happened might occur because of the absence of a barrier, the test being whether they should have foreseen that a vehicle running along the highway might be precipitated over the bank. *Branegan v. Verona,* 137

4. That decedent, whose death was due to his automobile running off the bank of a turnpike, turned from the beaten track a few inches when the road presented a muddy appearance, did not make him guilty of contributory negligence as a matter of law. *Ibid.*

Highways on town line: Joint liability of towns.

5. Where two towns were negligent in permitting a telephone wire running diagonally across the road where it intersected the boundary line between the towns, to sag below the clearance height of twenty-four feet required by sec. 1329*a*, the fact that plaintiff's injury was caused by the overturning of a buggy in which she was driving, after its canopy top came in contact with the defect in one town, does not alter the fact that the default of each town concurred as the proximate cause of the result so as to render them jointly liable under sec. 1339. *Trzebiatowski v. Pike Lake,* 345

Law of the road. See AUTOMOBILES. EVIDENCE, 10.

HOLDER IN DUE COURSE. See BILLS AND NOTES, 5, 6, 8.

HOMESTEAD.

Residents only may invoke homestead exemption.

A wife who is a resident of another state cannot defeat an incumbrance of property upon the ground that it is a homestead, since the benefits of the homestead exemption, under sec. 2203, are available only to residents of the state. *Ludwig v. Ludwig,* 41

HUSBAND AND WIFE.

See DIVORCE. EXECUTORS, 2. HOMESTEAD. PARENT AND CHILD. TRUSTS, 1. WORKMEN'S COMPENSATION, 11–14, 20.

Agreement to execute mortgage on joint property: Validity.

An agreement to execute a mortgage upon land owned by the husband and wife to secure a loan was binding upon the wife, notwithstanding coverture, where the proceeds of the loan went into property in which both husband and wife were conducting their separate lines of business. *Ludwig v. Ludwig,* 41

IMITATION OF YELLOW BUTTER. See FOOD, 4, 5.

IMPAIRMENT OF CONTRACT. See CONTRACTS, 1.

IMPLIED CONTRACTS. See ACCOUNT STATED, 2. ACTION. CONTRACTS, 7. COUNTIES, 1. GARNISHMENT. INJUNCTION. PAYMENT, 2.

IMPUTED NEGLIGENCE. See AUTOMOBILES, 7.

INCIDENTAL TO EMPLOYMENT. See WORKMEN'S COMPENSATION, 3–7.

INCOME TAXES. See SOLDIERS' BONUS LAW, 3 (b). TAXATION, 6–9.

INDORSEMENT. See ALTERATION OF INSTRUMENTS. BILLS AND NOTES, 1–6, 8. EVIDENCE, 3, 4. PRINCIPAL AND SURETY, 2. SUBROGATION, 2.

INDUSTRIAL COMMISSION. See CONSTITUTIONAL LAW. WORKMEN'S COMPENSATION.

INFANTS. See COMPROMISE, 2. CONSTITUTIONAL LAW. COSTS, 2. GUARDIAN AND WARD. LIMITATION OF ACTIONS, 2. NEGLIGENCE, 6. WORKMEN'S COMPENSATION, 1.

INFERIOR COURTS. See COURTS, 1, 3–7.

INJUNCTION.

See PAYMENT, 2.

Grounds: To prevent transfer of note: Action for fraud.

Injunction to prevent the transfer of a note is the appropriate remedy under sec. 2774, in an action by plaintiffs for recovery on implied contract brought after discovery of the fraud. *Scheuer v. R. J. Schwab & Sons Co.* 630

INNOCENT PURCHASER. See FRAUDULENT CONVEYANCES.

INSANE PERSONS. See WORKMEN'S COMPENSATION, 13.

INSTRUCTIONS TO JURY. See APPEAL, 12. ASSAULT AND BATTERY, 2. CONTRACTS, 8. CRIMINAL LAW, 3, 4. NEGLIGENCE, 8. TRIAL.

INSURANCE.

See APPEAL, 10.

Agent to solicit insurance: Powers: Date insurance becomes effective.

1. The bond of an agent reciting that he is appointed to solicit and write insurance, but further providing that he shall not solicit or accept insurance except in accordance with the by-laws, does not make the insurance effective from the date of the application, contrary to the by-laws. *Goldberg v. Seneca, Sigel & Rudolph M. F. Ins. Co.* 116

The insurance contract: By-laws of company: Effect on negotiations between agent and member.

2. Under a by-law of the company providing that it should be liable for losses occurring from the time an application for insurance was received by the secretary until its rejection, it was not liable for a loss before the application reached the secretary. *Goldberg v. Seneca, Sigel & Rudolph M. F. Ins. Co.* 116

3. This by-law prevented any liability on the soliciting agent's oral contract of insurance made with the applicant, who was already a member of the company by reason of other insurance. *Ibid.*

4. Under secs. 1927 and 1933, providing for the organization of town mutual fire insurance companies and making every policy-holder in such a company a member thereof, an applicant for insurance who held other insurance in the company and was therefore a member was charged with knowledge of by-laws fixing the conditions of insurance. *Ibid.*

5. Sec. 1933, requiring an applicant, at the time of effecting insurance with a mutual company, to pay such sums as may be required by the rules or by-laws, does not make the insurance effective at that time, contrary to a by-law making it effective from the secretary's receipt of the application. *Ibid.*

Same: Construction against insurer.

6. Where two constructions are possible, the construction given to clauses of a life insurance policy by the company itself must be considered as very persuasive. *Carlson v. Scandia L. Ins. Co.* 342

7. In case of doubt or ambiguity the language of an insurance policy should be construed most strongly against the insurer, but such construction cannot be resorted to unless ambiguity exists. *Reeves v. Midland C. Co.* 370

8. A clause in a life insurance policy allowing thirty-one days of grace for payment of all premiums after payment of the first was properly construed by the trial court as applying to a provision requiring a written permit to be obtained and an extra premium to be paid in case of the assured's entry into the military service, the two provisions not being entirely clear and the company having construed the provision for thirty-one days of grace during which the policy remained in force as applying to the military service provision. *Carlson v. Scandia L. Ins. Co.* 342

Premiums: Payment by note.

9. A note given for a premium does not operate as a payment in the absence of an express agreement to that effect. *Wagener v. Old Colony L. Ins. Co.* 1

10. Credit for the first premium due on a life insurance policy may be extended to an insured, and may be shown by the facts and circumstances under which the application for insurance and delivery of the policy was carried out and the general course of business as conducted by the insurance company through its agent. *Ibid.*

11. The evidence in this case is *held* insufficient to show that a note of the insured, payable to the local agent of the insurer, was given and accepted as payment of the first annual premium on the insured's life policy. *Ibid.*

Occupation of insured: Classification by insurer after insured fairly described his duties.

12. A high-salaried employee of an electric gear shift manufacturing company, whose occupation, consisting of both office work and traveling, was that of interesting automobile manufacturers in the electric gear shift and procuring contracts for equipment of automobiles therewith, and who in visiting manufacturers used an automobile, given him for his personal use, to show how the automobile was equipped with such gear shift, was not an "automobile dealer demonstrating" or a "salesman traveling, selling, operating, exhibiting, or setting up machinery or implements or automobiles," within the classification set out in the manual of rates of an accident insurance company, but was properly placed in the classification of "office duties and traveling" by the agents of the insurer after the insured had fully and fairly stated the nature of his duties, where such classification more accurately described his occupation than any other in the manual. *Warren v. Globe Indemnity Co.* 600

Estoppel and waiver.

13. A recital in a life insurance application that the first annual premium, immediately due, had been paid in cash, has no evidentiary weight on the issue as to whether insured's note was payment, where concededly no such cash payment was made. *Wagener v. Old Colony L. Ins. Co.* 1

14. A letter of the general agent of an insurer to the insured, dated September 24th, calling the insured's attention to the fact that his first premium was due September 9th and asking him to give the matter his immediate attention if the premium had not already been paid, is not binding as a declaration that the policy was then in force, being but a friendly admonition to the insured. *Ibid.*

Extent of liability: Full indemnity not payable for period of convalescence.

15. A health and accident policy which limited full indemnity to the period during which insured should be necessarily and continuously confined within the house and therein regularly visited by a physician did not render the insurer liable to pay full indemnity for a time when insured, though merely convalescent and unable to go out for his ordinary affairs, nevertheless was able to sit on the porch and to make visits to his doctor. *Reeves v. Midland C. Co.* 370

Notice: Knowledge of injury: Mailing of notice.

16. Where the loss of an eye did not result within twenty days after an accident, and a physician after such time told insured that he could not then say that the injury was due to the accident, a notice to the insurer within twenty days after the insured was definitely told by the physician that the accident was the cause of the loss of the eye was a compliance with an accident policy requiring notice of injury to the insurer

within twenty days from the date of the accident unless it was not "reasonably possible to give such notice." *Sheafor v. Standard Acc. Ins. Co.* 307

17. Testimony of insured's physician that he "mailed" a notice of illness to the insurer, as required by the policy, is sufficient proof of mailing, though there was no specific showing that the notice was inclosed in an envelope properly addressed and deposited in the postoffice with the postage prepaid. *Reeves v. Midland C. Co.* 370

18. The evidence in this case is *held* to warrant a finding that the notice of insured's illness, given to the insurer by insured's physician, pursuant to his request, was in compliance with the requirements of the policy. *Ibid.*

Action in tort for delay of agent in forwarding application.

19. Whether an insurance company or the agent is liable in tort for unreasonable or unnecessary delay in forwarding an application for insurance is not decided, and the case will not be remanded for a trial of that question, under sec. 2836*b*, especially as the present judgment would not be a bar to such an action. *Goldberg v. Seneca, Sigel & Rudolph M. F. Ins. Co.* 116

INTENT. See CRIMINAL LAW, 1, 3. FOOD, 3, 4.

INTEREST.

See ACCORD AND SATISFACTION, 2.

Delay in payments not chargeable to breach of contract: Effect on interest: Does not entitle payee to interest.

1. Where the delay in issuing a final certificate of architects and making final payment was not chargeable to any breach of the contract obligation on the part of the defendant county, the plaintiff contractors were not entitled to interest on the final and delayed payment on the contract price. *Tomlinson v. Ashland County,* 58

Interest as damages: After verdict. See TRIAL, 5.

2. In an action involving a claim for damages arising from breach of a contract, where the amount of such damages cannot be ascertained from the contract itself and a consideration of evidence is required, an additional sum may be allowed, equal to interest on the damages recovered at the statutory rate from the time when the breach occurred. *Edward E. Gillen Co. v. John H. Parker Co.* 264

3. The amount of the claim of a buyer of a farm against the seller thereof for damages for misrepresentations not having been liquidated before verdict, the trial court properly allowed interest only from the date of the verdict and denied interest from the time the deal was consummated. *Olson v. Laun,* 106

INTERPLEADER. See MECHANICS' LIENS, 4, 6.

INTERVENTION. See MECHANICS' LIENS, 4. PARTIES.

INTOXICATION. See AUTOMOBILES, 1, 4.

IRRIGATION. See DRAINS, 4.

JOINDER OF PARTIES. See BILLS AND NOTES, 8.
JOINT LIABILITIES. See CORPORATIONS, 3, 4. HIGHWAYS, 5.
JUDGMENT. See APPEAL, 1, 6. DIVORCE, 2.
JUDICIAL NOTICE. See EVIDENCE, 1.
JURISDICTION. See APPEAL. COURTS. WORKMEN'S COMPENSATION, 15.
JURY. See CRIMINAL LAW, 4. NEW TRIAL.
JUSTIFICATION. See ASSAULT AND BATTERY, 2.
LAND CONTRACT. See VENDOR AND PURCHASER.
LANDLORD AND TENANT. See FRAUDS, STATUTE OF, 1.
LEASES. See FRAUDS, STATUTE OF, 1.
LEGISLATURE. See STATES, 1.
LENDING CREDIT OF STATE. See SOLDIERS' BONUS LAW, 15.
LEVY of tax. See TAXATION, 4.
LICENSE to enter upon land. See LOGS AND LOGGING, 1. SPECIFIC PERFORMANCE, 1.
LIENS. See MECHANICS' LIENS. SALES, 10.
LIFE INSURANCE. See INSURANCE, 6, 8–11, 13, 14.

LIMITATION OF ACTIONS.

See COUNTIES, 4. MECHANICS' LIENS, 7.

Action of fraud: Accrual upon happening of event: Discovery of fraud.

1. An action for a money judgment for damages caused by defendant's fraud in procuring plaintiff to sign a note and mortgage being purely a legal action, the cause of action accrued when the fraud was perpetrated and not when it was discovered by plaintiff; and sub. (7), sec. 4222, providing that a cause of action for relief on the ground of fraud in a cause cognizable in equity does not accrue until discovery of the fraud, does not apply. *Stahl v. Broeckert,* 627

Operation: Running of statute as against minor heir: Tax sales.

2. Where the statute of limitations began to run in favor of a son in possession of the farm of his deceased father as against another heir, it also began to run as to an infant child of such heir. But such rule would not apply to redemption by a minor from a tax sale, sec. 1166 giving him one year after reaching majority within which to redeem. *Hahn v. Keith,* 524

LIQUIDATED DAMAGES. See DAMAGES. GAMING. PLEADING.
LIVERY-STABLE KEEPERS. See NEGLIGENCE, 1.

LOGS AND LOGGING.

License to enter upon lands to cut timber purchased: Revocability. See SPECIFIC PERFORMANCE, 1–5.

1. A clause in a contract permitting a paper company to enter upon a lumber company's lands and cut the timber it had purchased is more than a mere license, it being a privilege

incident to a valid grant, evidenced by a written instrument, supported by a valid consideration, has been acted upon by the plaintiff, and is therefore not revocable. *Dells P. & P. Co. v. Willow River L. Co.* 19

Construction of contract: Practical construction by parties.

2. Where a lumber company operated a logging railway for seven years and without objection made settlement on a certain basis with the purchaser of logs and pulp wood from it and a railway company which carried the logs from the end of the logging road to the purchaser, such acquiescence is conclusive against the lumber company as to the basis on which the contract freight rate was to be apportioned between its logging road and the purchaser in the latter's suit for specific performance. *Dells P. & P. Co. v. Willow River L. Co.* 19

LOST WILL. See WILLS, 7.

MAINTENANCE. See CHAMPERTY AND MAINTENANCE.

MALICIOUS PROSECUTION.

Probable cause: Advice of counsel.

1. One who makes a complaint on the advice of a reputable attorney, after a full, fair, and honest statement to the attorney of all facts and information within his knowledge, honestly believing the person charged to be guilty, has probable cause, as a matter of law, for his action. *Smith v. Federal R. Co.* 497

2. The defense of advice of counsel as probable cause does not fail because the complainant, before verifying the complaint, did not state to the district attorney that the person charged with the crime was of good character and reputation, where the district attorney advised him that the facts and circumstances communicated were in themselves good grounds for commencing a criminal action and proceeded upon the belief that the person complained against was of good standing in the community. *Ibid.*

MALPRACTICE. See PHYSICIANS AND SURGEONS.

MANDAMUS.

See EVIDENCE, 5.

To test order refusing change of venue.

1. *Mandamus* is the proper remedy to test the validity of an order refusing a change of venue, in view of sec. 3069, Stats. (ch. 212, Laws 1895), rendering such orders nonappealable. *State ex rel. T. L. Smith Co. v. Superior Court,* 385

To compel town clerk to use reassessment rolls.

2. The supreme court has original jurisdiction in *mandamus* to compel a town clerk, in making his tax roll, to use reassessment rolls as required by sec. 1087—57, Stats. 1917, notwithstanding the objection that a purely local question is involved, where the remedy in the lower courts appears from the petition and answer to be entirely lacking or to be inadequate and ineffective. *State ex rel. Blaine v. Erickson,* 205

Enforcement of an administrative duty: Creation of new ward by council.

3. Where there is a plain duty on the part of an official body such as the council of a city, compliance therewith may be enforced by *mandamus*. *State ex rel. Ingold v. Mayor, etc.* 133
4. Sec. 926—8 makes it mandatory upon the common council of a city, on petition of a specified number of resident electors and freeholders in any election district within a ward, to make a new ward including the territory of the election district, and leaves open as a matter of discretion only the manner in which the new ward shall be created, either by making it entirely of the district or by adding other territory, so that *mandamus* to compel the council to act on the petition is not an attempt to control or regulate the manner in which the council shall exercise that discretion. *Ibid.*

MARRIAGE. See HUSBAND AND WIFE.

MASTER AND SERVANT.

See GUARANTY, 1. NEGLIGENCE, 1, 2. WORKMEN'S COMPENSATION.

Compensation of servant by share in profits.

1. In an action against the manager of a theater for an accounting, the evidence is *held* to show that his compensation was to be a percentage of the profits and does not sustain a finding by a referee, confirmed by the court, that he was entitled to the value of the services rendered. *American A. Co. v. McWilliams,* 101

Injury to servant: Minors in prohibited employment: Farm hands: Contributory negligence. See COSTS, 2.

2. The employment of a minor as a farm hand in the occupation of pulling stumps with a stump-puller was within sub. 2, sec. 1728*a*, prohibiting the employment of minors in dangerous or unhealthful occupations, a stump-puller not being an elevator, lift, or hoisting machine, within schedule (b), par. 6, designating the running of "elevators, lifts, or hoisting machines" as dangerous or unhealthful, and agricultural occupations not coming within the prohibition of such statute, in view of sec. 1728*e*, and notwithstanding sec. 2394—41. *Squires v. Brown,* 165
3. The child-labor statutes not being applicable to the case, a seventeen-year-old farm hand, injured while pulling stumps with a defective stump-puller, cannot recover in an action against his employer for negligence, where his own want of ordinary care proximately contributed to his injuries. *Ibid.*

MATERIALMEN. See MECHANICS' LIENS.

MAXIMS.

Expressio unius est exclusio alterius, 413, 511.
Res ipsa loquitur, 522.
Res judicata pro veritate accipitur, 121, 124, 151, 153.
Stare decisis, 151, 153, 387, 471.

MEASURE OF DAMAGES. See APPEAL, 12. DAMAGES.

MECHANICS' LIENS.

See MORTGAGES, 1.

Lien by subcontractor: Letter as notice: Service.

1. Where the last labor and material for the erection and construction of a building were furnished by a subcontractor within sixty days of September 19th, when the subcontractor by its attorney sent a letter to the person who, as attorney and agent, represented the owner and the contractor's surety, which letter, though lacking the usual formality of a notice of lien and containing some immaterial matters, nevertheless stated the amount due the subcontractor for work, labor, and materials furnished, and claimed a lien, such letter was also such a notice as was required by sec. 3315, Stats. 1913. *Neil & Co. v. Wis. Tel. Co.* 298
2. The notice of claim of a mechanic's lien required by said sec. 3315 may be served on the owner or his agent in a county other than that in which the property is located, and need not, if service cannot be made in such county, be filed in the office of the clerk of the circuit court of the county. *Ibid.*

Same: Assignment by principal contractor of payments due: Lien of subcontractor.

3. A subcontractor on a building which has perfected its lien for work, labor, and material, the greater part having been furnished before the date of the contractor's assignment to a bank of funds or payments due from the owner, has a prior and superior right to payment from such funds over that of the bank. *Neil & Co. v. Wis. Tel. Co.* 298
4. In the subcontractor's action to foreclose its lien against the contractor, owner, and the contractor's surety as defendants, wherein a bank was interpleaded as assignee of the money due the contractor, and other creditors of the contractor intervened, judgment in favor of the assignee bank to recover the balance of the money due the contractor from the owner, after deducting the amount of the judgment for the plaintiff subcontractor, is proper under the circumstances of the case. *Ibid.*

Same: Priority to funds due from owner: Contractor's surety and his assignee: Costs.

5. A contractor's surety which has no claim for moneys previously paid by it on account of its liability as surety to release any lien on the owner's property or for any claims paid by it, and there being no other mechanics' liens constituting a superior and prior claim to that of a bank as creditor of the contractor on the funds received on the building contract, has no superior equitable right over that of the bank, assignee from the contractor of moneys due, to the amount due the contractor from the owner. *Neil & Co. v. Wis. Tel. Co.* 298
6. In the subcontractor's action to foreclose its mechanic's lien, the contractor's surety, made a defendant, is not entitled to be reimbursed for the costs, disbursements, and attorneys' fees it has incurred in litigating the issues, standing in such

respect in the place of the owner, which, had it undertaken to litigate the issues, would have been liable for costs where the subcontractor and the contractor's assignee, which interpleaded, recovered. *Ibid.*

Waiver of lien: Taking note secured by mortgage.

7. Notwithstanding sec. 3317, Stats. 1917, provides that the taking of a note or other evidence of indebtedness shall not destroy a mechanic's lien, by accepting a mortgage securing a promissory note extending the time of payment of the indebtedness to a period beyond which the statute prescribed for the commencement of an action to foreclose the lien, and by including other indebtedness, the lienor waived any subsequent right to assert his lien under the statute, which refers to the taking of a note falling due within the time limited for the commencement of an action to foreclose the lien. *Miller-Pichl Co. v. Mullen,* 378

MILWAUKEE CITY CHARTER. See EMINENT DOMAIN, 5.

MINOR HEIR. See LIMITATION OF ACTIONS, 2.

MINORS. See GUARDIAN AND WARD. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 2, 3. NEGLIGENCE, 6. WORKMEN'S COMPENSATION, 1.

MISREPRESENTATION. See FRAUD.

MISTAKE. See COUNTIES, 1–3. CORPORATIONS, 9, 11. EQUITY. EVIDENCE, 7.

MONEY LOANED. See USURY.

MONOPOLY. See CONTRACTS, 2.

MORTGAGES.

See BANKS. BROKERS, 3. HUSBAND AND WIFE. LIMITATION OF ACTIONS, 1. MECHANICS' LIENS, 7.

Rights of one in possession of land: Mortgagee charged with knowledge.

1. A mortgage of four acres out of a larger tract to a corporation whose predecessor had furnished materials for a building on such four-acre tract, made by a mortgagor who was out of possession of the four acres and had only record title thereto, having sold to her brother, conveyed no interest in the four acres to the mortgagee, which stood charged with knowledge of the rights of the brother as the real owner in actual possession. *Miller-Piehl Co. v. Mullen,* 378

Right of grantee to contest mortgage mentioned in deed.

2. A grantee, by accepting with full knowledge and subsequently recording a warranty deed containing the clause "subject to a mortgage," did not thereby so recognize the obligation of the apparent mortgage on the land as to bar him from asserting its invalidity as against his own title in a foreclosure action, such clause not lessening the estate passing to him by the other terms of the deed. *Miller-Piehl Co. v. Mullen,* 378

Agreement to execute mortgage: Equitable lien.

3. Where money has been borrowed upon the assurance, relied upon by the lender, that a mortgage to secure a loan would be executed upon certain land, an equitable lien for the balance due upon the loan will be impressed upon the land. *Ludwig v. Ludwig,* 41

MOTIONS. See COURTS, 1, 2. TRIAL, 6.

MOTOR VEHICLES. See AUTOMOBILES. PUBLIC UTILITIES.

MUNICIPAL CORPORATIONS.

See COUNTIES. EMINENT DOMAIN, 1–4. MANDAMUS, 3, 4.

Creation of new ward: Failure to publish notice: Effect.

1. Failure to publish notice at the time of the filing of a petition to make an election district into a ward will not defeat the right of the petitioners to have the mayor and common council act, if the notice is afterwards published. *State ex rel. Ingold v. Mayor, etc.* 133

Firemen's pension: Retirement: Disability not attributable to occupation.

2. In view of secs. 959—46*m* and 959—46*n*, the legislative intention, under sec. 959—46*l*, was to exclude from the right to a pension any member of a fire department who must be permanently retired prior to twenty-two years of service because of a disability or disease which is not so contracted that it can properly be said to have some causal connection with his line of duty as a fireman. *State ex rel. Johnson v. Trustees, etc.* 154

MUTUAL FIRE INSURANCE COMPANIES. See INSURANCE, 1–5, 19.

MUTUALITY. See CROPS. SPECIFIC PERFORMANCE, 7.

NE EXEAT.

Functions and grounds. See DIVORCE, 2.

Since secs. 2784–2786 do not specify the grounds on which a writ of *ne exeat* may issue, the functions and grounds of the writ are governed by the common law. *In re Grbic,* 201

NEGLIGENCE.

See APPEAL, 11. AUTOMOBILES. EVIDENCE, 10, 16. HIGHWAYS, 3–5. INSURANCE, 19. MASTER AND SERVANT, 2, 3. PHYSICIANS AND SURGEONS, 1–4. PRINCIPAL AND AGENT. TRIAL, 3. WORKMEN'S COMPENSATION.

Acts constituting negligence: Runaway horse.

1. A delivery boy, driving a horse and wagon which his employer had hired from a public livery stable, who jumped from the vehicle when a line broke after the right thill fell from the axle, was not negligent in what he did, and, the jury having found no negligence on the part of the liveryman in letting out the rig or the employer in using it, a person who was run down by the horse and wagon could not recover from the employer. *Sharkey v. Shurman,* 350

Same: Setting fires.

2. In an action to recover damages for the loss by fire of plaintiff's slaughter-house and personal property, alleged to have been caused by the negligence of the employees of defendant, questions as to whether a fire started by the defendant on its adjoining premises the day before the loss was wholly extinguished on that day, and, if not, whether it spread early the next morning to plaintiff's premises, are *held* to have been for the jury, the evidence being in conflict. *Hiller v. Trout Brook Co.* 127

Same: Lack of supervision and care in piling timber.

3. Where an appliance under the management of defendant inflicts injury by reason of an abnormal and unexpected movement which could not have taken place had there been proper care exercised in its management or supervision, the abnormal action, in the absence of satisfactory explanation, affords evidence of lack of such care. *Peschel v. Klug,* 519

4. Where three timbers, weighing 1,600 pounds each, were piled parallel with the line of an alley, and the top timber fell and injured one frequenting the alley, the falling of the timber, in the absence of satisfactory explanation, afforded evidence of lack of care in piling; and the question whether the timbers fell because of insecure piling, or whether the fall resulted from the swerving of a truck against them, is for the jury. *Ibid.*

Contributory negligence. See APPEAL, 11. AUTOMOBILES, 6, 7. HIGHWAYS, 4. MASTER AND SERVANT, 3. WORKMEN'S COMPENSATION, 8.

Same: Passing near building from which ice is being removed.

5. Where a rope was stretched from a building, from the roof of which ice was being removed, to a point near the street-car tracks, it was not negligence as a matter of law for one alighting from a car to pass alongside the car and by a man holding the rope, though he was killed by falling ice. *Gordon v. Wis. Nat. Bank,* 582

Same: Children: Boy jumping on moving car.

6. While children of tender age are not held to that degree of care ordinarily exercised by adults, a boy thirteen years old, of ordinary intelligence, who jumped on moving cars and was struck by a dwarf signal near the track with which he was familiar, is contributorily negligent as a matter of law. *Kollentz v. C. & N. W. R. Co.* 454

Actions for negligence: Sufficiency of evidence. See APPEAL, 11. EVIDENCE, 10, 16. PHYSICIANS AND SURGEONS, 1–4.

7. A finding of negligence cannot rest upon mere conjecture. *Sharkey v. Shurman,* 350

Same: Instructions on damages: Repeated use of word "direct." See TRIAL, 3.

8. In an action for personal injuries sustained by plaintiff, due to a derailment of defendant's train on which he was a passen-

ger, an instruction on the measure of damages in which the court repeatedly used the word "direct" in stating that the injuries must have been a "direct result" of the accident, and that the damages must have "directly resulted" from the accident, is objectionable. *Braun v. M., St. P. & S. S. M. R. Co.* 10

9. The conclusion arrived at by a consideration of the entire record, that the plaintiff had not suffered an injury to his head because of the accident, requires an affirmance of the judgment. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL.

See APPEAL, 14. COURTS, 1, 2, 8. DAMAGES, 8.

Discretionary power of court: New trial after concurring verdicts.

While a trial court may properly, and undoubtedly should, set aside a second concurring verdict of a jury with greater reluctance than in the first instance, his discretionary power is still existent, the jury system being the common-law system and there being no statute changing such discretion. *Gross Coal Co. v. Milwaukee,* 467

NEW WARD, Creation of. See MANDAMUS, 4. MUNICIPAL CORPORATIONS, 1.

NOMINAL DAMAGES. See SALES, 7.

NONRESIDENT PARTIES. See ADVERSE EXAMINATION, 1.

NONSUIT. See SALES, 7.

NOTICE.
Of adverse examination. See ADVERSE EXAMINATION, 1.
Of appeal. See APPEAL, 2.
Of application to review error. See APPEAL, 3.
Of illness. See INSURANCE, 17.
Of injury. See APPEAL, 10. INSURANCE, 16.
Of lien. See MECHANICS' LIENS, 1, 2.
Of possession of land. See TENANCY IN COMMON, 3.

OBLIGATION OF CONTRACT. See CONTRACTS, 1.

OFFER. See CROPS.

OFFER OF JUDGMENT. See ACCORD AND SATISFACTION, 2.

OFFICERS. See CORPORATIONS, 3–5, 8. EVIDENCE, 5. INSURANCE, 3, 5.

OFFSET. See SOLDIERS' BONUS LAW, 3 (e).

OLEOMARGARINE. See FOOD, 3, 4.

OPINION EVIDENCE. See EVIDENCE, 10, 11.

OPTION. See SPECIFIC PERFORMANCE, 3. WORKMEN'S COMPENSATION, 2.

OUSTER of cotenants. See TENANCY IN COMMON, 2–4.

PARENT AND CHILD.

See CONTRACTS, 10. COSTS, 2. DEEDS, 4.

Parent's right of custody: Welfare of child as determining factor.

1. Whatever right to the custody of a child the parent has by legislative provisions similar to those of secs. 3964, 3965, or under the rules of the common law, must stand aside if a recognition of such right would materially interfere with the paramount right of the child to have its welfare considered and conserved by the court. *Guardianship of Bare,* 543
2. In a proceeding to vacate a guardianship over a five-year-old infant, an order restoring the custody of the child to the mother is proper upon a finding that the mother and her husband can furnish a suitable home and care for the child, although it is also found that the defendant, who had brought up the child as his own since it was three years old, is likewise able to furnish such home and care. *Ibid.*

Same: Compensation as condition of restoration of child.

3. It was error to make the payment of compensation for the care of a child a condition for its return to the mother. *Guardianship of Bare,* 543

Agreement to support parents: Gratuity: Revocability. See SPECIFIC PERFORMANCE, 6, 7.

4. A son's agreement to pay his parents $100 a month during the rest of their lives, where there was no consideration therefor, was a mere revocable gratuity, which was revoked by his failure to carry it out. Nor could his wife, by joining in such an agreement, bind herself to its terms. *Ludwig v. Ludwig,* 41

PAROL AGREEMENTS. See FRAUDS, STATUTE OF, 1.

PAROL EVIDENCE. See EVIDENCE, 6–9. TRUSTS, 1. WITNESSES, 2.

PARTIES.

See SUBROGATION, 2. WORKMEN'S COMPENSATION, 16.

Person interested in subject matter of controversy. See BILLS AND NOTES, 8.

A judgment creditor who had garnished a debtor's funds in a bank may intervene in an action brought against the debtor by another creditor who had garnished the same fund, and may present the debtor's defenses to the principal action, the judgment creditor having "such an interest in the subject matter of the controversy" under sec. 2610 as to require that he be made a party for the due protection of his rights. *Scheuer v. R. J. Schwab & Sons Co.* 630

PARTNERSHIP. See COURTS, 8.

PART PERFORMANCE. See FRAUDS, STATUTE OF.

PATIENT. See PHYSICIANS AND SURGEONS.

PAYMENT.

See ACCORD AND SATISFACTION, 1. DEEDS, 4. GUARDIAN AND WARD. PRINCIPAL AND SURETY, 2. SUBROGATION. USURY, 1.

Promissory note as payment. See INSURANCE, 9, 11, 13. MECHANICS' LIENS, 7.

1. The taking of a promissory note, either for a preceding liability or a debt incurred at the time, is not payment unless expressly agreed to by both parties. *Wagener v. Old Colony L. Ins. Co.* 1

Recovery of payment made upon false representations: Relief.

2. A complaint alleging that a contract was entered into giving plaintiffs the right to sell defendant's goods in certain territory in consideration of a cash payment and the execution of a note; that plaintiffs were induced to enter into the contract by fraudulent representations; that plaintiffs, upon discovery of the fraud, tendered back the contract and demanded the return of the money and the note; and that defendant was insolvent, and asking that the transfer of the note be enjoined, that the contract be rescinded, and that plaintiffs recover the note and the money paid, states a cause of action for recovery on implied contract. *Scheuer v. R. J. Schwab & Sons Co.* 630

PENALTY. See DAMAGES, 1–4. PLEADING.

PENSION OF FIREMAN. See MUNICIPAL CORPORATIONS, 2.

PERFORMANCE of contract. See CONTRACTS. SPECIFIC PERFORMANCE.

PERJURY.

See CRIMINAL LAW, 2.

False complaint: Admissibility in evidence: Instructions.

1. A complaint in a civil action pending in a court having jurisdiction to hear the cause is a material matter in the proceeding, and an oath verifying it, being one in regard to a matter before a court and authorized by law, will sustain a prosecution for perjury if wilfully and falsely and corruptly made. *Lappley v. State,* 356
2. The complaint itself was admissible in evidence to show that it was a verified pleading and that defendant swore that the facts stated therein were true, it not being received "as evidence of a fact admitted or alleged in such pleading," within sec. 2665. *Ibid.*
3. It is not error for the court to state to the jury that certain material facts are proven beyond controversy when they are established by the undisputed evidence. *Ibid.*

PERMANENT PARTIAL DISABILITY. See WORKMEN'S COMPENSATION, 18.

PERMISSIVE USE. See ADVERSE POSSESSION. TENANCY IN COMMON, 1, 4.

PERMIT to work. See WORKMEN'S COMPENSATION, 1.

PERSONAL INJURIES. See APPEAL, 10–12. AUTOMOBILES. COSTS, 2. DAMAGES, 9. EVIDENCE, 10, 11. HIGHWAYS, 3–5. MASTER AND SERVANT, 2, 3. NEGLIGENCE. PHYSICIANS AND SURGEONS, 3, 4. TRIAL, 1, 3. WORKMEN'S COMPENSATION.

PERSONAL PROPERTY. See BANKS. BILLS AND NOTES. BROKERS, 3. CHAMPERTY AND MAINTENANCE. CORPORATIONS, 1–7, 9. CROPS. DAMAGES, 4. DIVORCE, 3, 4. EXECUTORS, 1. FRAUDS, STATUTE OF, 2. FRAUDULENT CONVEYANCES. INJUNCTION. PAYMENT, 2. SALES. TAXATION, 6, 7. USURY. VENDOR AND PURCHASER.

PHYSICIANS AND SURGEONS.

See EVIDENCE, 11. WORKMEN'S COMPENSATION, 15.

Actions for negligence: Improper diagnosis: Degree of skill required.

1. Where, in an action for malpractice, the medical testimony showed that the failure of a physician to accurately diagnose plaintiff's condition was not due to lack of skill, care, or judgment, a directed verdict in his favor was proper although in the course of an operation disclosing pregnancy plaintiff's inflamed appendix had been removed contrary to her wish that she should not be operated upon if she were pregnant, she having consented to an operation if not pregnant and instructed the physician to remove the appendix if an operation was performed. *Jaeger v. Stratton,* 579
2. Where a physician exercises that degree of care, diligence, judgment, and skill which others in good standing of the same school of medicine usually exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of science at such time, failure to diagnose correctly does not render him liable. *Ibid.*

Same: Negligence of physician not cause of plaintiff's condition.

3. One side of plaintiff's face became paralyzed after an operation performed by a physician, which condition might have resulted from a severance of the facial nerve or from other causes. There being no evidence that the nerve was severed, but, on the contrary, the evidence being positive and undisputed that it was not, the court properly directed a verdict for the defendant. *Finke v. Hess,* 149

Same: Bad result as presumption of negligence.

4. Proof of bad result from a surgical operation raises no presumption of negligence in this case. *Finke v. Hess,* 149

PLACE.

Of adverse examination. See ADVERSE EXAMINATION, 2.
Of trial. See VENUE.

PLEADING.

See ACCORD AND SATISFACTION, 1. COURTS, 8. PRINCIPAL AND SURETY, 2. QUIETING TITLE, 2. SUBROGATION, 2.

Liberal construction on appeal: Denial of damages.

On appeal, an allegation of the answer in an action on contract that plaintiff suffered no damage will be liberally construed,

as being equivalent to an allegation that the agreed measure of damages was unreasonable, and therefore as presenting the question whether the agreed damages are liquidated damages or a penalty, the case being presented on that theory and no other question being argued. *Sheffield-King M. Co. v. Jacobs,* 389

PLEDGE. See SALES, 10.

POLICE POWER. See FOOD, 1.

POLICY OF INSURANCE. See APPEAL, 10. INSURANCE.

POSSESSION. See MORTGAGES, 1.

PRACTICAL CONSTRUCTION. See LOGS AND LOGGING, 2. SOLDIERS' BONUS LAW, 1.

PREMIUMS. See INSURANCE, 8–11, 13, 14.

PRESCRIPTION. See WATERS, 1, 2.

PRESUMPTIONS. See APPEAL, 5, 6. EVIDENCE, 2–5. PHYSICIANS AND SURGEONS, 4. WILLS, 11. WORKMEN'S COMPENSATION, 14.

PRINCIPAL AND AGENT.

See CORPORATIONS, 3–6, 8. EVIDENCE, 8, 9. GUARANTY, 1. GOOD WILL. INSURANCE, 1–3, 11, 12, 14, 19.

Right of unfaithful agent to compensation: Forfeiture.

An agent who is guilty of fraud upon his principal, or who betrays his trust bv acting adversely to the interest of his principal, or is guilty of unfaithfulness, dishonesty, gross misconduct, gross mismanagement or unskilfulness, or who fails to follow express instructions, as a general rule forfeits his right to compensation. *Arthur Koenig Co. v. Graham G. Co.* 472

PRINCIPAL AND SURETY.

See APPEAL, 14. GUARANTY. MECHANICS' LIENS, 5, 6.

Subrogation of surety: Discharge by creditor's release of security. See SUBROGATION.

1. A surety paying the debt of his principal is subrogated to the security held by the creditor, and the latter's voluntary surrender of the same to the debtor discharges the surety *pro tanto. Defiance M. Works v. Gill,* 477
2. In an action by the secured holder of a note against the indorser, plaintiff need not allege that the security is still in his hands and that he is ready and able to surrender the same to the indorser on payment of the note. *Ibid.*

PRIORITIES. See MECHANICS' LIENS, 3–5.

PROBABLE CAUSE. See MALICIOUS PROSECUTION.

PROBATE of wills. See WILLS, 4–11.

PROCEDURE in criminal cases. See CRIMINAL LAW.

PROCURING CAUSE. See BROKERS, 2–4, 6–9.

PROMISSORY NOTES. See BILLS AND NOTES.

PROMOTERS. See CORPORATIONS, 1.

PROVISIONAL REMEDY. See ADVERSE EXAMINATION, 4.

PROXIMATE CAUSE. See AUTOMOBILES, 1–3, 7. HIGHWAYS, 3, 5. MASTER AND SERVANT, 3. WORKMEN'S COMPENSATION, 10.

PUBLIC POLICY. See ELECTRICITY, 1.

PUBLIC PRINTING. See STATES.

PUBLIC PURPOSE. See SOLDIERS' BONUS LAW.

PUBLIC UTILITIES.

See ELECTRICITY. EMINENT DOMAIN. RAILROADS.

Motor vehicles engaged in transportation: Supervision by railroad commission.

1. Under secs. 1797—62 to 1797—68, declaring operators of motor vehicles engaged in passenger transportation to be common carriers, and requiring them to obtain a certificate from the railroad commission, but not expressly authorizing the commission to exercise any supervision after issuing the certificate, the commission has no supervisory power as to routes or service, especially as the legislature rejected provisions giving such power and no penalty is imposed for violating new or amended orders of the commission. *Monroe v. Railroad Comm.* 180

Railroad commission: Powers.

2. The railroad commission being a tribunal of purely statutory creation, its powers and jurisdiction must be found in the statutes creating it. *Monroe v. Railroad Comm.* 180

PURCHASER. See VENDOR AND PURCHASER.

QUALIFICATION of trustee. See TRUSTS, 2.

QUANTUM MERUIT. See ACCOUNT STATED, 2.

QUESTIONS FOR JURY. See AUTOMOBILES, 2, 3, 5, 6. BROKERS, 7, 8. CORPORATIONS, 2, 5. HIGHWAYS, 1, 4. NEGLIGENCE, 2, 4, 5. SALES, 8. WILLS, 3.

QUIETING TITLE.

Who may maintain action: Source of title: Possession.

1. An action to remove a cloud on title to real estate can only be maintained by one who shows title in himself, either legal or equitable, or shows that he has a lien or incumbrance on the land; and the plaintiff, not tracing title to the government, does not prove title by virtue of a deed from a person not shown to have been in possession. *Madler v. Kersten,* 424

2. Where in such an action defendant put the title in issue by answer, the fact that thereafter the active litigation centered about the validity of a tax deed held by defendant did not deprive defendant of his defense of no title, there being no affirmative withdrawal and no act misleading plaintiff as to defendant's position. *Ibid.*

RAILROAD COMMISSION. See EMINENT DOMAIN, 1, 2. PUBLIC UTILITIES.

RAILROADS.

See DAMAGES, 9. EMINENT DOMAIN, 1–5. LOGS AND LOGGING, 2. NEGLIGENCE, 6, 8.

Federal control: Actions against director general.

Under sec. 10 of the federal railroad control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), authorizing actions to be brought against carriers as then provided by law, an action could be brought against a carrier in its corporate name; and General Order No. 50 of the director general of railroads, requiring actions to be brought against the director general, is therefore invalid, the legislative declaration being the paramount authority. *Franke v. C. & N. W. R. Co.* 71

RATIFICATION. See CORPORATIONS, 11.

REAL-ESTATE BROKERS. See BROKERS.

REAL PARTY IN INTEREST. See BILLS AND NOTES, 8.

REAL PROPERTY. See ADVERSE POSSESSION. CONTRACTS, 10. COURTS, 4. DAMAGES, 7. DEEDS. DRAINS. ELECTRICITY. EMINENT DOMAIN. EXECUTORS, 1. FRAUD. HOMESTEAD. HUSBAND AND WIFE. MECHANICS' LIENS. MORTGAGES. RELEASE. TENANCY IN COMMON. VENDOR AND PURCHASER.

REASSESSMENT. See MANDAMUS, 2. TAXATION, 1–5.

RECKLESS DRIVING. See AUTOMOBILES, 5.

REDEMPTION from tax sale. See LIMITATION OF ACTIONS, 2.

REFERENDUM. See SOLDIERS' BONUS LAW, 6.

RELEASE.

See CORPORATIONS, 5.

Dismissal of pending action upon promises of defendant: Acceptance: Effect.

Where one defrauded in an exchange of real property, after bringing an action to cancel the deeds and have the title restored to her, gave the defendant whom she claims committed the fraud a release from all claims she might have against him upon his promise that he would procure in exchange certain property for her, and the next day he told her that such property could not be had and offered to secure in exchange other property, and she thereupon had her attorneys procure an appraisal of the property, after which she consummated an exchange and stipulated a dismissal of her action, she cannot avoid the release of her cause of action against the defendant. *Kessler v. Leinss,* 583

RELIGIOUS SCHOOLS. See SOLDIERS' BONUS LAW, 16.

REMEDIES. See INJUNCTION.

REMOVAL OF CLOUD. See QUIETING TITLE.

RES ADJUDICATA. See APPEAL, 13. INSURANCE, 19. WORKMEN'S COMPENSATION, 16.

RES IPSA LOQUITUR. See NEGLIGENCE, 3.

RESCISSION. See CORPORATIONS, 2, 4–7. PAYMENT, 2.

RESTRICTIONS. See ELECTRICITY.

RESTRICTIVE INDORSEMENTS. See BILLS AND NOTES, 1–6, 8.

REVERSAL. See APPEAL, 14.

REVIEW. See APPEAL, 2–4.

RIGHT-OF-WAY AGREEMENTS. See ELECTRICITY.

ROADS AND STREETS. See AUTOMOBILES. EMINENT DOMAIN. HIGHWAYS. NEGLIGENCE, 4, 5. TRIAL, 3.

RULES OF COURT.
Circuit Court Rule XV (Tender and payment of money in court), 353, 356.

SALES.

See PAYMENT, 2. SPECIFIC PERFORMANCE, 1–5.

Remedies of seller: Election of remedy. See CHAMPERTY AND MAINTENANCE. DAMAGES, 1–4. EVIDENCE, 3, 4, 9.

1. Upon the buyer's breach of a contract for the sale of goods in the possession of the seller, the seller may (1) hold the property for the buyer and sue for the purchase price, or (2) sell the property as the agent of the buyer and recover the difference between the contract price and the fair market value upon resale as the liquidated amount of the damages, or (3) keep the goods and recover the difference between the contract price and the fair market value. *Schuenemann v. John G. Wollaeger Co.* 616
2. By selling an automobile to a third party upon the buyer's breach of his contract of purchase, the seller elected to waive the right to stand on its bargain and accept as the measure of its damages the difference between the price the buyer agreed to pay and the price received from the person to whom the machine was sold. *Ibid.*
3. The vendor of goods upon a contract of conditional sale does not waive the right to retake the goods by attempting to enforce collection of the purchase price. This principle is now embodied in the statute law of the state by sec. 1684*u*—24, Stats. 1919 (ch. 672, Laws 1919). *Defiance M. Works v. Gill,* 477

Same: Actions for purchase price: Evidence as to quantity sold. See ACCORD AND SATISFACTION, 1.

4. In an action for the purchase price of pine paving blocks sold to the defendants, the evidence for plaintiff, consisting of depositions of its employees based on the plant records, is *held* sufficient to sustain a finding of the trial court as to the quantity of blocks delivered. *Kettle River Co. v. Hase,* 621
5. Evidence as to the number of square yards of surface laid with sandstone paving blocks as calculated by the city engineer under certain contracts which defendants had with the city was not competent to show the amount of blocks shipped by the plaintiff to the defendants, particularly in the absence of evidence of any witness having personal knowledge there-

of that all the blocks received on the tracks were hauled to the respective streets upon which they were to be laid. *Ibid.*

Same: Readiness of seller to perform.

6. In a seller's action for the breach of a contract for the sale of flour to be manufactured, a complaint which, while not alleging that plaintiff had purchased any particular lot of wheat for the manufacture of the flour, did allege that plaintiff was ready, able, and willing to perform, must be taken to mean that plaintiff had on hand the raw materials out of which the flour was to be manufactured. *Sheffield-King M. Co. v. Jacobs,* 389

Remedies of buyer: Failure of seller to deliver: Question for jury. See CROPS. FRAUDS, STATUTE OF, 2.

7. A buyer is in any event entitled to nominal damages for the seller's refusal to deliver, and a nonsuit is improperly granted. *New Richmond R. M. Co. v. Arnquist,* 130

8. Where there was some evidence of substantial damage from a seller's breach of contract, the amount was a question for the jury. *Ibid.*

Same: False representations inducing sale: Knowledge of seller: Reliance by buyer. See CORPORATIONS, 1–7.

9. If representations inducing a sale were material and false, and the maker knew or should have known that they were false, or made them recklessly without knowledge, and the injured party relied on them as true without present means of knowledge of their falsity, and suffered damage, he was defrauded in the legal sense. *Denis v. Nu-Way P. C. Co.* 333

Conditional sale: Nature: When title passes.

10. A conditional sale, as shown by reservation of title in the sale notes, is not a pledge or lien in the nature of a chattel mortgage, but is an executory sale contract vesting the right of possession in the purchaser, while the title remains in the seller until the imposed conditions are met by the purchaser. when title *ipso facto* passes to him by virtue of the original agreement. *Defiance M. Works v. Gill,* 477

Sales in bulk. See FRAUDULENT CONVEYANCES.

SATISFACTION.
Of judgment. See TRIAL, 6.
Of mortgage. See BANKS.

SEALS. See EVIDENCE, 6.

SECRETARY OF STATE. See SOLDIERS' BONUS LAW, 5.

SELF-DEFENSE. See ASSAULT AND BATTERY, 1, 2.

SEPARATE ESTATE. See HUSBAND AND WIFE.

SERVICE.
Of notice of lien. See MECHANICS' LIENS, 2.
Of subpœna. See ADVERSE EXAMINATION, 1.

SERVICE RECOGNITION BOARD. See SOLDIERS' BONUS LAW, 4.

SERVICES. See EXECUTORS, 2. MASTER AND SERVANT, 1. SOLDIERS' BONUS LAW, 8.

SETTING FIRES. See NEGLIGENCE, 2.
SETTLEMENT. See COMPROMISE AND SETTLEMENT. RELEASE.

SOLDIERS' BONUS LAW.

CASH BONUS: *Constitutionality: Public purpose: Conflict with federal legislation.*

1. Money appropriated under the Soldiers' Bonus Law (ch. 667, Laws 1919) and awarded to persons who served in the armed forces of the United States, and who at the time of their induction into that service were residents of Wisconsin, is for a public purpose, the services benefiting the state as well as the nation; and the exercise of the taxing power of the state in raising money to be given as an appreciation of the patriotic services rendered is justified. The assertion of power for a long period of time by similar legislative enactments and continued custom amounting to practical construction of constitutional provisions, while perhaps not controlling, is entitled to great weight on the question of public purpose. *State ex rel. Atwood v. Johnson,* 218
2. The federal government having only delegated powers, and powers not granted to it expressly or by necessary implication being reserved to the states respectively, or to the people, by art. X of the federal constitution, and the state of Wisconsin having reserved to itself a certain military policy not inconsistent with that granted to the federal government by the federal constitution, the United States and the state have a concurrent right to legislate in respect to a subject matter not exclusively granted to Congress. The power of Congress to raise and support armies and to provide a navy does not preclude the Wisconsin legislature from enacting the soldiers' bonus law, which does not burden, interfere, or conflict with any federal legislation. *Ibid.*

Same: Taxing scheme of act.

3. The taxing scheme embodied in the act is constitutional:
   (a) The three-mill tax, being a general tax on all property for a public purpose, is not open to the objection of inequality of burden, special legislation, or want of equal protection of the law.
   (b) The surtax provision is in effect an amendment to the income tax law, and under the law relating to income taxation, if the classification be proper and the exemptions reasonable, it is valid, the uniformity clause of the constitution having no application to the income tax. Since the classification is in conformity to the law, as there is no discrimination within a class and the exemptions in each class apply to every member of the class, it is no objection that the exemptions in one class are different from those in another.
   (c) The fact that the surtax was levied upon 1918 incomes only, and the real-estate tax upon the assessment of 1919 only, did not constitute such incomes or assessment a class. They were merely the resources of the next tax levy upon which the additional tax required by the act was laid.

(d) It is proper classification to put corporations in one class and individuals in another, as there is a substantial difference in the situation—a corporation being an artificial creature of the state endowed with advantages which an individual does not possess; and the fact that the surtax of the individual begins with the fourth thousand of taxable income, while that of the corporation begins with the first thousand, does not make the exemptions arbitrary or whimsical.

(e) The fact that the general law provides that income taxpayers are entitled as an offset to the extent of the personal property tax paid and that the soldiers' bonus act denies the offset against a surtax, does not make the present act discriminatory or a denial of due process. *Income Tax Cases,* 148 Wis. 456, followed.

(f) Sec. 7 of the act is in effect an amendment to the income tax law; and in determining the basis upon which the six per cent. deduction allowed to corporations is to be computed, the capital stock, surplus, and undivided profits must be allocated on the same basis as the allocation of the income tax is to be made; and as the provision thus construed treats all corporations alike, there is no discrimination in favor of or against foreign corporations.

(g) The right granted to county boards to elect to issue bonds does not delegate to the county the legislative power to levy the mill tax, the legislature having levied the tax and the provision relating to the issue of bonds being an administrative detail regarding payment. *State ex rel. Atwood v. Johnson,* 218

Same: Delegation of legislative power: Secretary of state as ex officio auditor.

4. The duties conferred upon the service recognition board by the act are purely ministerial, and, the legislature having laid down a rule of law respecting its duties and vesting it with the determination of the facts, it is not a delegation of the taxing power of the legislature. *State ex rel. Atwood v. Johnson,* 218

5. Although the law gives the service recognition board charge and control of the general scheme of payments and authorizes that body to adopt rules for the distribution of the fund, the ascertainment and selection of the beneficiaries, and the determination of the amounts to which they are entitled, it does not violate sec. 2, art. VI, of the state constitution, as it is incumbent upon the secretary of state to audit and pass upon all matters of which under the constitution he is *ex officio* auditor. *Ibid.*

Same: Submission to people.

6. The provision for submission to the people of the question whether the tax shall be levied does not render the act unconstitutional, it being within the power of the legislature to make the taking effect of the law dependent on a vote of the people. *State ex rel. Atwood v. Johnson,* 218

EDUCATIONAL BONUS: *Constitutionality: Purpose.*

7. The purpose of the Educational Bonus Law (ch. 5, Laws 1919, Special Session) as gathered from the act itself supplemented by contemporaneous history, is to express by material means the gratitude of the people of the state to those of its citizens who signally and heroically performed the task that called them into action during the recent emergency, and primarily to stimulate patriotism and quicken the perception in our citizens of their sacred duty to defend the government in time of need. Whether the volunteer system of the Civil War or the selective service method be employed, stimulation of patriotism is necessary because heroic and successful action in an emergency springs from patriotic desire and not from compulsion. *State ex rel. Atwood v. Johnson,* 251

8. The gift or bonus provided by the act is not granted by way of extra compensation for services rendered, nor to reimburse the soldier, but to express the gratitude of the state and stimulate love of country in the donor, the recipient, and the public at large, to the end that an impressive object lesson in patriotism be conveyed. *Ibid.*

9. If the important documents that have given birth to our government be examined to see what their framers considered governmental or public purposes, it will be seen that the Declaration of Independence, Articles of Confederation, and our National and State Constitutions expressly declare that the insuring of domestic tranquillity and providing for the common defense are strictly governmental functions; and the ultimate sanction behind security is the force of the militia, just as the compelling power of a court's decree is the power of the state to enforce it. *Ibid.*

10. Unless it clearly appears that the expenditure of the money levied will have no tendency to effectuate the purpose sought to be accomplished the act is valid, for its purpose is to promote in the citizenry of the state a readiness to serve when its tranquillity is threatened; and the stimulation of this patriotic devotion is a governmental function. *Ibid.*

11. Whether the law will effectuate its purpose sufficiently to justify the expenditure of money is a legislative question within the boundaries of the constitution; and the legislature might well say that an appreciation of the services rendered will tend to stimulate others in the future, that it will create a reciprocal understanding and confidence between soldier and citizen, permitting those who were debarred from active service to make an offering to those who served, and that the gratitude of the state should be expressed to those of our citizens who aided in repelling the invasion of our national security. *Ibid.*

12. If the giving of money to returned soldiers is a public purpose, as was held in the *Cash Bonus Case* (*ante*, p. 218), the giving to them of an education is even more a public purpose, because in both peace and in war a free government's guar-

anty of continuity and security lies in the education of its people. *Ibid.*

13. Legislative enactments in Wisconsin and other states during the Civil War and thereafter, the policy of the federal government from an early date in regard to pensions, and contemporaneous legislation in nearly every state in the Union appropriating money to aid the returned soldier, while not conclusive, are very persuasive as to what is a public purpose, and will control in the absence of specific, express, or implied constitutional language to the contrary. *State v. Whitcom,* 122 Wis. 110, distinguished. *Ibid.*

Same: Right of state to grant bonus to its citizens entering federal service.

14. The federal government being a government of the states that compose it, a state furnishing troops to defend the nation defends itself; and the beneficiaries of the act were not agents of another government so that the state is precluded from granting a bonus to those of its citizens who were inducted into the national service. [Whether the state could lawfully extend the bonus to other than military servants furnished by it, not decided.] *State ex rel. Atwood v. Johnson,* 251

Same: Loaning credit or creating debt.

15. By the act the state does not lend its credit or create a debt, contrary to secs. 3 and 4, art. VIII, of the constitution, as the money is levied for the purpose of making a gift revocable at will and no contract relation is established. [Whether when the money is collected and is in the hands of the state treasurer a beneficiary could compel its payment, not decided.] *State ex rel. Atwood v. Johnson,* 251

Same: Aid to religious schools.

16. Financial benefit does not accrue to religious schools from the act, as they are not enriched by the service they render, only the actual increased cost to such schools occasioned by the attendance of the beneficiaries being paid to them. *State ex rel. Atwood v. Johnson,* 251

SPECIAL ASSESSMENT. See COUNTIES, 4.

SPECIAL LEGISLATION. See SOLDIERS' BONUS LAW, 3 (a).

SPECIAL PROCEEDING. See ADVERSE EXAMINATION, 3.

SPECIAL VERDICT. See APPEAL, 5, 11. AUTOMOBILES, 3. DAMAGES, 9. TRIAL.

SPECIFIC PERFORMANCE.

See CONTRACTS, 2. COURTS, 3.

Nature and grounds: Exhaustion of remedy: Inadequate remedy at law. See LOGS AND LOGGING, 2.

1. The purchaser of logs and pulp wood from a lumber company is not obliged first to exhaust its remedy under its contract by cutting the timber itself or attempting to go on defendant's lands for that purpose, the lumber company having expressly revoked, canceled, and terminated the purchaser's license to cut the timber. *Dells P. & P. Co. v. Willow River L. Co.* 19

2. In this case the purchaser, suing for specific performance of the contract, has not an adequate remedy at law as plain, adequate, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy. *Ibid.*

Contracts enforceable: Definiteness: Award of damages.

3. The contract is not so indefinite and uncertain as to be incapable of specific performance by the lumber company at the suit of the plaintiff paper company because of options to be exercised by the lumber company, most of the uncertainties complained of arising by reason of the lumber company's wilful breach, and the contract providing for all reasonable contingencies. *Dells P. & P. Co. v. Willow River L. Co.* 19

4. The paper company is entitled to specific performance of the contract, which is definite and certain, its legal remedy being inadequate and valuable rights under the contract being preservable to it in no other way, the contract having been performed by the lumber company for seven years and finally breached only on account of an advance in the price of logs and pulp wood. *Ibid.*

5. The court having taken jurisdiction for the determination of the equitable issues involved in a suit for specific performance, properly determined and awarded damages sustained by the plaintiff from the time of the breach by defendant to the date of the judgment. *Ibid.*

Same: Necessity of consideration: Mutuality. See FRAUDS, STATUTE OF, 1.

6. Equity will not enforce a promise by a son and daughter-in-law to give to his parents $100 a month during the rest of their lives unless there is something that at least approaches an adequate consideration for the promise. *Ludwig v. Ludwig,* 41

7. Nor will such an agreement be enforced in equity where the parents made no promises as a consideration therefor, made no improvements upon premises which they were permitted to occupy, and made no material sacrifice in moving thereon. *Ibid.*

Authority of attorney to make contract.

8. A claim that by letters passing between the holder of a deed and his attorney and the attorney for plaintiffs a specifically enforceable agreement was made out to deed back the land, regardless of the validity of the tax deed, in consideration of offered reimbursement, is not proved where there is no showing that the attorney had authority to make such an agreement. *Madler v. Kersten,* 424

STARE DECISIS. See WORKMEN'S COMPENSATION, 16.

STATES.

See CONSTITUTIONAL LAW. COURTS, 6, 7. DRAINS, 4. TAXATION.

Governmental functions. See SOLDIERS' BONUS LAW, 9.

Questions for legislature. See SOLDIERS' BONUS LAW, 11.

Concurrent powers of state and federal governments. See SOLDIERS' BONUS LAW, 2.

Soldiers' bonus. See SOLDIERS' BONUS LAW.

Power of legislature to define word used in statute.

1. The legislature may provide its own definition of a word used in a law which it enacts, and, when it does so, that definition must necessarily control, regardless of dictionary definitions. *McCarthy v. State,* 516

Public printing: Contract: Embossing. See EVIDENCE, 5.

2. In view of sec. 4971, Stats. 1917, providing that in the construction of the statutes "all words and phrases shall be construed and understood according to the common and approved usage of the language," the word "embossing" as used in ch. 657, Laws of 1911, as amended by sec. 35.43, Stats. 1917, prescribing a scale of maximum prices for state printing, includes the stamping of titles, names, figures, and designs on the covers of books printed and bound by a contractor for such printing. *State ex rel. Cantwell P. Co. v. Hull,* 174
3. Such contractor is not concluded by the opinion of the attorney general that "embossing" as used in the statute did not include the work done by him, although he agreed in the contract to be guided by the attorney general's interpretation of the statutes, the determination of the meaning of "embossing" requiring a resort to evidence as to the common usage of the word. *Ibid.*
4. The contractor can recover for embossing titles and designs on the covers of books under the contract on account of orders given him by the printing board requiring to be done the work which he did do, though the word "embossing" was not used, and though sec. 35.39, Stats. 1917, provides that no state printer shall be paid for printing not authorized by written order of the printing board or chief clerk of the legislature. *Ibid.*

Lending credit or creating debt. See SOLDIERS' BONUS LAW, 15.

Aiding religious schools. See SOLDIERS' BONUS LAW, 16.

Officers. See EVIDENCE, 5.

STATE TREASURER. See SOLDIERS' BONUS LAW, 15.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES: Constitutionality. See FOOD, 1. SOLDIERS' BONUS LAW. WORKMEN'S COMPENSATION, 1, 2.

STATUTES CONSTRUED. See ADVERSE EXAMINATION, 1–4. APPEAL, 3–5, 14. AUTOMOBILES, 1, 4, 5. BILLS AND NOTES, 1, 4, 8. CORPORATIONS, 1. COSTS, 2. COUNTIES, 4. COURTS, 1–8. DIVORCE, 2, 3. DRAINS, 1, 2, 4. EMINENT DOMAIN, 5. EVIDENCE, 6. FOOD. HIGHWAYS, 5. HOMESTEAD. LIMITATION OF ACTIONS, 1, 2. MASTER AND SERVANT, 2, 3. MECHANICS' LIENS, 1, 2, 7. MUNICIPAL CORPORATIONS, 2. NE EXEAT. PARTIES. PUBLIC UTILITIES, 1. RAILROADS. SALES, 3. STATES, 2, 4. TAXATION, 1, 2, 5–9. WATERS, 3. WILLS, 8, 9. WORKMEN'S COMPENSATION, 1, 2, 6, 7, 13–15.

STIPULATED DAMAGES. See DAMAGES, 1–4. PLEADING.
STIPULATIONS. See EVIDENCE, 5. TRIAL, 5–7.
STOCKHOLDERS. See CORPORATIONS. GOOD WILL.
STREET RAILWAYS. See APPEAL, 11. AUTOMOBILES, 6. NEGLIGENCE, 5.
STREETS. See ROADS AND STREETS.
SUBCONTRACTORS. See CONTRACTS, 5–9. DAMAGES, 5, 6. MECHANICS' LIENS, 1, 3, 4, 6. TRIAL, 5–7. WORKMEN'S COMPENSATION, 5.
SUBMISSION of law to people. See SOLDIERS' BONUS LAW, 6.
SUBPŒNA. See ADVERSE EXAMINATION, 1.

SUBROGATION.

See PRINCIPAL AND SURETY, 1.

Nature: Waiver by surety: How pleaded.

1. Subrogation is an equitable right in favor of a surety which does not arise until payment has been made; and a surety may waive his right to subrogation. *Defiance M. Works v. Gill,* 477
2. The right of subrogation presents a justiciable issue which should be made up and brought to the court's attention by a proper and orderly pleading by the surety upon the buyer's conditional sale note; but where the pleadings tendered no such issue, it may not be implied from the mere recital in the notes that title was retained by the seller until payment, and the matter may not be determined where all necessary parties are not before the court. [Whether an indorser of a conditional sale note, upon paying the obligation, succeeds to the rights of the vendor under the contract of sale, not decided.] *Ibid.*

SUBSCRIBING WITNESSES. See WILLS, 5, 9.
SUPERIOR COURT OF DANE COUNTY. See COURTS, 4–7.
SUPREME COURT. See APPEAL. COURTS, 1, 5. MANDAMUS, 2.
SURETY. See PRINCIPAL AND SURETY.
SURFACE WATERS. See WATERS, 1.
SURGEONS. See PHYSICIANS AND SURGEONS.
SURTAX. See SOLDIERS' BONUS LAW, 3 (b).

TAXATION.

See SOLDIERS' BONUS LAW.

Preparation of tax roll: Discretion of clerk: Reassessment. See MANDAMUS, 2.

1. When an assessment roll has been completed and passed on by the board of review, the assessor must, under sec. 1064, deliver it to the town clerk, who shall examine it and make certain specified necessary corrections (sec. 1065), after which he must prepare the tax roll, which shall contain a list of all the taxable real property (sec. 1078), and calculate the amount required to be raised on such valuation. Such

acts being purely ministerial, the town clerk is without judicial discretion to determine that a reassessment is invalid; and defects therein cannot excuse or justify his refusal to comply with the law. *State ex rel. Blaine v. Erickson,* 205

2. When reassessment rolls were filed with the town clerk they became by operation of law the rolls upon which the taxes apportioned to the town were to be calculated, and, under sec. 1087—57, if filed too late to take the place of the original rolls, they were to be taken into account in making the next succeeding tax roll. *Ibid.*

3. The statutory direction to the town clerk to include corrections made on the basis of the reassessment in the levy and apportionment of the tax roll next following the completion of the reassessment is a continuing mandate to that officer, imposing upon him the duty of including corrections necessary to give effect to the reassessment until it has been actually carried out in the manner provided by law. *Ibid.*

4. It is not the duty of a town clerk to anticipate any inequalities resulting from the corrections to be made on the basis of reassessment rolls for previous years and attempt to adjust them, but to levy the tax as the law requires, since matters relating to private rights are subject to other remedies. *Ibid.*

5. It is the duty of the town clerk, under sec. 1087—57, to take reassessment rolls and from them prepare the tax roll in the manner pointed out by statute, making the necessary credits and debits to give effect to the reassessments for the preceding year; and he is in no position to question the regularity or pass upon the validity of the acts of those whose duty it was to prepare the reassessment rolls. *Ibid.*

Income taxes: Dividends out of capital or surplus of corporation.

6. Under sub. 2 (b), sec. 1087*m*—2, Stats., as amended by ch. 247, Laws 1917, a stockholder in any corporation to whom there has been paid a sum of money under the designation of dividends has a right to show that such payment or dividend was made out of the capital or surplus and is therefore not taxable, instead of out of the earnings or profits accrued since January 1, 1911, which would be taxable. *State ex rel. Moon v. Nygaard,* 415

7. Where a stockholder of a corporation exchanged his stock for stock in a holding company, and the holding company received from the corporation a so-called dividend, paid out of the surplus and not out of the earnings or profits accrued after January 1, 1911, a dividend paid by the holding company, resulting from such dividend from the surplus of the corporation, was not "income," within the meaning of sub. 2 (b), sec. 1087*m*—2, as amended by ch. 247, Laws 1917. *Ibid.*

Same: Deduction of federal income taxes.

8. Sub. (d), sec. 1087*m*—3, Stats. (the income tax act), authorizing the deduction from gross income of taxes imposed by any state or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by the Wisconsin act is derived, does not authorize the

deduction of federal income taxes, since such taxes are not imposed by any state, or territory or possession of the United States, nor are they imposed upon the source from which the income taxed by the Wisconsin law is derived. *State ex rel. Stern M. Co. v. Tax Comm.* 506

9. Sub. (b), sec. 1087*m*—3, authorizing "ordinary and necessary expenses" incurred in business to be deducted in calculating income taxes, does not authorize the deduction of federal income taxes, since such taxes are not peculiarly an expense of transacting business and the question of deducting taxes is specifically dealt with by sub. (d) of the same section. *Ibid.*

Tax deeds. See COUNTIES, 4. EXECUTORS, 1. QUIETING TITLE, 2. SPECIFIC PERFORMANCE, 8.

Tax sales. See COUNTIES, 4. LIMITATION OF ACTIONS, 2.

Redemption by minor from tax sale. See LIMITATION OF ACTIONS, 2.

TENANCY IN COMMON.

See ADVERSE POSSESSION.

Creation: Initial possession permissive.

1. The initial possession of a father's farm by a son who remained in possession after his father's death was permissive, but by declarations or acts, or both, such possession could have become adverse as to other children. *Hahn v. Keith,* 524

Same: Ouster of cotenants: Evidence.

2. There may be an ouster of cotenants by adverse possession; and the best evidence of ouster by a tenant in common is the exclusive actual possession of one claiming to hold adversely. *Hahn v. Keith,* 524
3. Actual notice that the possession of a tenant in common is adverse as to his cotenants may be given by acts as well as by declarations. *Ibid.*
4. Where a son who had remained in possession of his father's farm following the father's death had been in exclusive, notorious possession for thirty years, treating the land as his own, making valuable improvements, paying taxes, and using the proceeds of the crops, and where other heirs who had knowledge thereof never questioned the son's right to so occupy the farm and during such time never asked for an accounting, the trial court was warranted in finding that the son's possession was adverse to that of the other heirs, notwithstanding their claim that they had permitted him to use the farm expecting to receive their share upon his death. *Ibid.*

TENDER. See ACCORD AND SATISFACTION, 1, 2. CORPORATIONS, 11. PAYMENT, 2. RULES OF COURT.

TERMINATION OF CONTRACT. See CONTRACTS, 10, 11.

TESTAMENTARY INTENT. See WILLS, 4, 6.

TITLE.

To land. See ADVERSE POSSESSION. CONTRACTS, 10, 11. COUNTIES, 4. DAMAGES, 7. DEEDS. ELECTRICITY. EMINENT DO-

MAIN, 1, 3–6. EXECUTORS, 1. FRAUDS, STATUTE OF, 1. HOMESTEAD. HUSBAND AND WIFE. INTEREST, 3. LIMITATION OF ACTIONS, 2. LOGS AND LOGGING, 1. MORTGAGES. QUIETING TITLE. RELEASE. SPECIFIC PERFORMANCE, 8. TENANCY IN COMMON. TRUSTS. VENDOR AND PURCHASER.

To personal property. See BILLS AND NOTES, 2–6, 8. BANKS. CROPS. DIVORCE, 3, 4. EXECUTORS, 1. FRAUDS, STATUTE OF, 2. FRAUDULENT CONVEYANCES. INJUNCTION. MECHANICS' LIENS, 3–6. PRINCIPAL AND SURETY, 2. SALES. SPECIFIC PERFORMANCE, 1–5. TAXATION, 6, 7.

TORTS. See ACTION. ASSAULT AND BATTERY. AUTOMOBILES. CORPORATIONS, 3–7. COSTS, 2. DAMAGES, 9. EVIDENCE, 10, 11. FRAUD. HIGHWAYS. INJUNCTION. INSURANCE, 19. LIMITATION OF ACTIONS. MALICIOUS PROSECUTION. MASTER AND SERVANT, 2, 3. NEGLIGENCE. PAYMENT, 2. PHYSICIANS AND SURGEONS. PRINCIPAL AND AGENT. RELEASE. SALES, 9. TENANCY IN COMMON. TRIAL, 1, 3. WATERS. WORKMEN'S COMPENSATION.

TOWN BOARDS. See HIGHWAYS, 3. TRIAL, 3.

TOWN CLERK. See MANDAMUS, 2. TAXATION, 1.

TRANSACTIONS WITH DECEDENTS. See APPEAL, 9. WITNESSES.

TRANSMISSION LINES. See ELECTRICITY. EMINENT DOMAIN, 6.

TREBLE DAMAGES. See WORKMEN'S COMPENSATION, 1.

TREES. See ELECTRICITY. EMINENT DOMAIN, 6.

TRESPASS. See EMINENT DOMAIN, 6.

TRIAL.

See ATTACHMENT. CHAMPERTY AND MAINTENANCE. CORPORATIONS, 7. COURTS, 9. CRIMINAL LAW. NEGLIGENCE, 7. QUIETING TITLE, 2.

Place of trial. See VENUE.

Waiver of jury trial. See APPEAL, 10. WORKMEN'S COMPENSATION, 1.

Examination of witnesses. See APPEAL, 8.

Same: Witness changing testimony. See APPEAL, 10.

Evidence: Opinion evidence. See EVIDENCE, 10, 11. CRIMINAL LAW, 2.

Same: Parol evidence. See EVIDENCE, 6–9.

Same: Judicial notice. See EVIDENCE, 1, 2.

Same: Presumptions. See EVIDENCE, 3–5.

Proof of damages. See CONTRACTS, 8. DAMAGES.

Objections and exceptions. See DAMAGES, 6, 8.

Questions for jury. See AUTOMOBILES, 2, 3, 5, 6. BROKERS, 7, 8. CORPORATIONS, 2, 5. HIGHWAYS, 1, 4. NEGLIGENCE, 2, 4, 5. SALES, 8. WILLS, 3.

Burden of proof. See ASSAULT AND BATTERY, 2.

Nonsuit. See SALES, 7.

Instructions to jury: Elements of damage omitted. See APPEAL, 12.

INSTRUCTIONS TO JURY.

1. An instruction on damages for personal injury which omitted several elements of loss proper to be considered by the jury, is erroneous where the instruction contains a clause that the jury should not include any other element. *Braun v. M., St. P. & S. S. M. R. Co.* 10

Same: Denial to give instructions already covered. See CRIMINAL LAW, 3.

2. Where the charge of the court was plain and fair and covered all the material issues in the case, there was no error in refusing to give certain requested instructions. *Olson v. Laun,* 106

3. The court having charged the jury that "the defendant was in duty bound to keep so much of the width of the highway in such condition that it was reasonably safe for public travel over it with an automobile driven by persons while using ordinary care," which was substantially a correct statement of the law, the refusal to give a requested instruction that the defendant town "has performed its duty if it properly grades and prepares a part of the highway of reasonable width and keeps the same in a suitable condition for the use of passengers, either on foot or in a conveyance," is not reversible error. *Branegan v. Verona,* 137

Same: Invading province of jury. See CRIMINAL LAW, 4.

Remarks of court. See PERJURY, 3.

Special verdict: Amendment by court: Evidence supporting findings. See APPEAL, 5. AUTOMOBILES, 3. DAMAGES, 9.

4. Where two witnesses testify positively to the existence of a promise by the deceased to leave her property to the plaintiff, the trial court was not justified in changing answers in the special verdict relating to the existence of such promise. *Felz v. Estate of Felz,* 550

Same: Concurring verdicts. See NEW TRIAL.

Directed verdict. See PHYSICIANS AND SURGEONS, 1.

Former adjudication. See RES ADJUDICATA.

Judgment on stipulation covering part of plaintiff's claim: Enforceability. See EVIDENCE, 5.

5. In an action by a subcontractor against the general contractor for a building, a stipulation recited that defendant had agreed to pay plaintiff a certain sum with interest after a specified date, being that part of plaintiff's demand claimed to be due and owing on the contract price, and that plaintiff had executed a voucher for said sum, and then provided that such partial payment and voucher should not prejudice plaintiff's right to recover, in the action, damages claimed by it to have been sustained by reason of delays, for which defendant is alleged to be responsible, in the doing of the work, and that the trial of the action should be confined solely to plaintiff's claim for such damages. *Held,* that at the end of the trial,

upon judgment being rendered for plaintiff, the court properly included therein the sum so agreed upon, with interest from the date specified. *Edward E. Gillen Co. v. John H. Parker Co.* 264

6. Upon the motion, presumably made under sec. 2892, for judgment for the amount fixed in such stipulation, the court might order defendant to satisfy that part of plaintiff's claim and might enforce such order as it enforces a judgment or provisional remedy, without waiting until the termination of the litigation on the question of damages on account of said delays. *Ibid.*

7. The liability admitted by said stipulation was a present liability, payable presently in money, and its payment was not subject to provisions of the contract as to when payments thereon should be made and that such payments should be partly in money and partly in stock of the corporation owner of the building. *Ibid.*

Reduction of damages. See DAMAGES, 8.

Interest on verdict. See INTEREST, 3.

New trial. See COURTS, 2. NEW TRIAL.

Costs. See COSTS.

Allowance to counsel in will contest. See WILLS, 10.

Trial by court. See APPEAL, 6, 14. DEEDS, 1, 2. SPECIFIC PERFORMANCE, 5–7. WILLS, 10.

Trial by industrial commission. See WORKMEN'S COMPENSATION.

TRUSTS.

See BILLS AND NOTES, 4, 5, 8. COUNTIES, 4. GUARDIAN AND WARD.

Creation: Deed absolute in form: Parol evidence.

1. Where a deed from a husband to his wife is absolute in form, an oral condition that she reconvey to plaintiff is void under sec. 2302, and parol evidence is not admissible to show that a trust was created. *Felz v. Estate of Felz,* 550

Failure of trustee to qualify: Effect on conveyances.

2. Where testator devised real property in trust with directions to sell, an assignment of the tax certificate in form by the executor, who was also a trustee, would not be valid even if the assignment were ascribed to the trustees, they not having given bond as such under sec. 4025. *Madler v. Kersten,* 424

ULTRA VIRES. See CORPORATIONS, 10.

UNDISCLOSED PRINCIPAL. See EVIDENCE, 8, 9.

UNHEALTHFUL OCCUPATIONS. See CONSTITUTIONAL LAW.

UNITED STATES. See SOLDIERS' BONUS LAW, 2, 9, 13, 14. TAXATION, 9.

USURY.

Remedies: Accounting as to sum borrowed.

1. Where plaintiff had borrowed numerous sums from defendant and had made repayment of various sums which he alleged amounted to more than the amount borrowed so as to constitute usury, but was unable to state with certainty the amount owing, and the facts were within defendant's knowledge, plaintiff was entitled to an accounting. *Starkey v. Murphy,* 614
2. Where in an action for an accounting the complaint alleged that plaintiff was not in possession of all the facts necessary to set up the plea of usury with the definiteness and certainty ordinarily required and that such facts were within the knowledge of defendant, a demurrer to the complaint was properly overruled. *Ibid.*

VENDOR AND PURCHASER.

See BROKERS, 3. CONTRACTS, 10. FRAUD. INTEREST, 3.

Construction of contract: "Net return."

1. Under an agreement between a vendor and a purchaser, to whom the vendor had conveyed his farm and the personal property thereon, that the purchaser should sell the personal property at auction and make certain payments to the vendor "if said sale result in a net return of $2,000 over and above all expenses of sale," the "net return" was to be ascertained by deducting from the amount for which the property was sold the expenses of the sale. *Morgan v. Richter,* 111
2. Where the purchaser agreed to sell the personal property at public auction and make payments to the vendor depending upon the net return of the sale, he was chargeable with the amounts for which portions of the property had been sold, although payment in full had not been received by him. *Ibid.*

VENUE.

See COURTS, 3.

Place of trial.

If no steps were taken to change the venue, an action is properly triable in the county where it was begun. *Dells P. & P. Co. v. Willow River L. Co.* 19

VERDICT. See APPEAL, 5.

VIADUCT. See EMINENT DOMAIN, 5.

VILLAGES. See WORKMEN'S COMPENSATION, 16.

VOLUNTARY PAYMENT. See GUARDIAN AND WARD.

WAIVER.

Of architect's certificate. See COUNTIES, 2.
Of jury trial. See APPEAL. 10. WORKMEN'S COMPENSATION, 1.
Of mechanic's lien. See MECHANICS' LIENS, 7.
Of objections to evidence. See DAMAGES, 6, 8.
Of remedy. See SALES, 2.
Of right of subrogation. See SUBROGATION, 2.

WARD. See GUARDIAN AND WARD.
WARRANTY DEEDS. See DEEDS. MORTGAGES, 2.

WATERS AND WATERCOURSES.

See DRAINS, 4.

Diversion of natural watercourses: Prescriptive right.

1. Natural watercourses cannot be lawfully diverted or surface water be collected and discharged upon a lower landowner to his damage in the absence of a prescriptive or statutory right thereto. *Cranberry Creek D. Dist. v. Elm Lake C. Co.* 362
2. Twenty years' continuous user is necessary to gain a prescriptive right to divert natural watercourses or collect surface water and discharge it upon a lower landowner; and if a canal carrying the waters has been materially enlarged, to gain the right by prescription to divert the increased flow caused by such enlargement would require user for twenty years after the enlargement. *Ibid.*

Same: Rights of cranberry growers: Damages.

3. In an action by a drainage district to enjoin the diversion of water from another watershed into the drainage district, the rights granted to cranberry growers by secs. 1472–1478 are subordinate to rights involving the public health or welfare, and the cranberry growers cannot justify the diversion thereunder as against the drainage district. *Cranberry Creek D. Dist. v. Elm Lake C. Co.* 362
4. Evidence that the amount of water diverted caused and will cause a material increase in the amount of water the ditches have to carry, and that such an increase is more marked in periods of average flow, is sufficient to sustain a finding of substantial damage. *Ibid.*

WIFE. See HUSBAND AND WIFE.

WILLS.

See TRUSTS, 2.

Public policy.

1. It is public policy to effectuate, where possible, the wishes of a testator. *Estate of Johnson,* 436

Agreement to make a will: Termination. See TRIAL, 4.

2. In an action on a claim against a decedent's estate based upon an alleged contract whereby plaintiff was to take care of decedent for life upon an understanding that her property was, after her death, to belong to plaintiff, evidence that plaintiff was absent from the farm upon which decedent resided for more than four or five years is sufficient to show a termination of such agreement. *Felz v. Estate of Felz,* 550
3. The evidence in this case is *held* to make it a question for the jury as to whether plaintiff had an agreement with the decedent such as he alleges. *Ibid.*

Execution: Probate and establishment of wills.

4. In proceedings for the probate of a will, the evidence is *held* to show that testator had signed the instrument, though there was a conflict in the expert testimony on handwriting, there being eye-witnesses to the act of signing, and also to show that he had signed the instrument with testamentary intent and not as a joke or without serious intention. *Estate of Johnson,* 436
5. Testimony of bystanders at the time of signing the will, though not subscribing witnesses, was properly received on the issue as to the genuineness of testator's signature, they having testified to having seen the instrument so signed by him. *Ibid.*
6. Post-testamentary declarations of testator to the effect that he had made a will and for the benefit of proponent were admissible in proceedings to probate the will. *Ibid.*
7. Such declarations are also admissible to prove the existence or contents of a will alleged to be lost. *Ibid.*
8. In the absence of statutory authority the probate court improperly allowed fees for services and expenses of proponent's handwriting expert to be paid out of the estate, particularly in view of sec. 4041*b*, expressly justifying the allowance from the estate of proponent's counsel fees. *Ibid.*

Competency of residuary legatee as subscribing witness.

9. Under secs. 2284, 4068, Stats., as they stood in 1895, a residuary legatee was a competent subscribing witness to a will, the common-law disqualification being wiped out and sec. 4069 not being applicable to the act of witnessing a will. *Estate of Johnson,* 436

Review of judgment admitting will to probate: Issue for determination.

10. On appeal from a judgment admitting a will to probate, contested for lack of genuineness of testator's signature, the only question at issue is whether or not the instrument propounded as a will should be admitted to probate. *Estate of Johnson,* 436

Lost will: Presumption of revocation.

11. In a proceeding to have an alleged lost will admitted to probate, the evidence is *held* sufficient to overcome the *prima facie* presumption that the will had been destroyed. *Will of Lauburg,* 502

WITNESSES.

Competency: Transactions with deceased persons: General conversation. See APPEAL, 9. WILLS, 5, 9.

1. Where decedent in a general conversation addressed to all within hearing made certain statements as to his will, those present all being persons interested in the estate, such communication could not, under sec. 4069, be testified to by those present. *Will of Lauburg,* 502

Same: Oral testimony as to contents of lost letter.

2. Oral testimony as to the contents of a letter claimed to have been received by the plaintiff from a deceased person and since lost, is inadmissible to prove the contract, as the sending and receipt of the letter was a transaction and the contents a communication with a deceased person under sec. 4069. *Felz v. Estate of Felz,* 550

Weight to be given testimony. See TRIAL, 4.

Examination of witnesses. See APPEAL, 8.

WORDS AND PHRASES.

Action. See p. 494.
As soon as reasonably possible, in insurance policy. See p. 313.
Automobile dealer, in insurance policy. See INSURANCE, 12.
Continue, in statute. See ADVERSE EXAMINATION, 4.
Directly or indirectly, in contract. See GOOD WILL.
Dividend, in statute. See p. 418.
Elevator, lifts or hoisting machine, in statute. See MASTER AND SERVANT, 2.
Embossing, in statute. See STATES, 2.
Food, in statute. See FOOD, 2.
For credit account of, in indorsement on note. See BILLS AND NOTES, 1.
Full and fair statement of all the facts. See pp. 500, 501.
Income, in statute. See TAXATION, 7.
Indirectly, in contract. See GOOD WILL.
Inferior court, in constitution. See COURTS, 4.
Interfere, in contract. See ELECTRICITY, 3.
Intoxicated, in statute. See pp. 491, 492.
Mailing or *mailed.* See p. 376.
Mediately or immediately, in statute. See DIVORCE, 3.
Net return, in contract. See VENDOR AND PURCHASER, 1.
Ordinary and necessary expenses, in statute. See p. 510.
Owned by, in statute. See COUNTIES, 4.
Public purpose. See SOLDIERS' BONUS LAW.
Regardless of who negotiates sale, in contract. See p. 599.
Restrictive indorsement, in statute. See BILLS AND NOTES, 1.
Services growing out of and incidental to his employment, in statute. See p. 297.
Special proceeding, in statute. See ADVERSE EXAMINATION, 3.
Subject to a mortgage, in deed. See p. 382.
Supervisory control, in constitution. See COURTS, 4, 6.
While contributing to, in statute. See pp. 156, 157.
Yellow butter, in statute. See FOOD, 5.

WORKMEN'S COMPENSATION.

Constitutionality of award of treble damages to minors of permit age.

1. The amendment of 1917 (ch. 624, Laws 1917) to the workmen's compensation act, providing that compensation be trebled if an injured employee be a minor of permit age and at the time of the injury is allowed to work without a written permit issued pursuant to sec. 1728*a*, Stats. 1917, is ger-

mane to the act, and is constitutional and not violative of the right to trial by jury. *Brenner v. Heruben,* 565

Same: Who may raise question: Employer electing to come under act.

2. An employer who had elected to come under the compensation act could question the constitutionality of an amendment thereto which was enacted and took effect after July 1, 1917, he having had no option to withdraw, in view of sec. 2394—5, until July 1st of the succeeding year. *Brenner v. Heruben,* 565

Conditions of liability: "Service growing out of and incidental to his employment."

3. In a proceeding under the workmen's compensation act to obtain compensation by a helper in a restaurant injured while grinding meat for Hamburger steak, a finding of the industrial commission that grinding the meat was incidental to the employment is *held* to be sustained by the evidence. *Brenner v. Heruben,* 565
4. A finding by the commission that such work was incidental to plaintiff's employment within the meaning of the compensation act must stand as a verity in the case when based on substantial evidence. *Ibid.*
5. A garbage collector whose immediate employer was employed by the city of Milwaukee to collect garbage and convey it by wagon to the city incinerator was, in view of sec. 2394—6, entitled to compensation from the city for injuries sustained while performing service growing out of and incidental to his employment, notwithstanding his immediate employer was not subject to the provisions of the workmen's compensation act. *Milwaukee v. Fera,* 348
6. Such employee, injured as a result of his horses becoming frightened while he was taking his equipment, part of which was owned by the city, back to the barn of his immediate employer after having taken his last load for the day to the city incinerator, was at the time of the accident performing service growing out of and incidental to his employment within the meaning of sub. (2), sec. 2394—3. *Ibid.*
7. Where a millwright in charge of the pattern department of an iron company, who had remained in the plant checking patterns after other employees had ceased work, observed a fire as he was leaving and entered a burning building where he lost his life, there is a reasonable inference that he entered the building either to look after valuable patterns or to save his employer's property; and, neither act requiring specific instructions from a superior, the conclusion of the industrial commission that at the time of his death he was performing service growing out of and incidental to his employment, within the meaning of sub. (2), sec. 2394—3, is sustained. *Belle City M. I. Co. v. Rowland,* 293

Same: Failure to consult doctor: Cause of death.

8. A teamster, kicked by a horse, who applied a salve used by him for slight injuries and continued at work until infection re-

sulted, without consulting a doctor, although advised to do so, did not as a matter of law refuse to adopt such means for recovery as an ordinarily prudent person would use under like circumstances, so as to defeat his widow's right to compensation. *Banner Coffee Co. v. Billig,* 157

9. The contention that an employer offered an employee medical attention, which he unreasonably refused to receive, cannot be predicated on a suggestion that he see a named doctor, where he was not told that the employer would pay the doctor or that he was the employer's physician. *Ibid.*

10. In this case the evidence is *held* insufficient to show with the certainty essential to overcome a finding of the industrial commission that a teamster kicked by a horse would not have died if he had secured medical treatment at an earlier date. *Ibid.*

Questions of dependency: Man and woman living together: Estrangement.

11. Whether a claimant widow and a deceased employee were living together at the time of his injury, within the meaning of sub. 3 (a), sec. 2394—10, is a question of fact to be decided by the industrial commission. *Smith v. Scheidegger Bros.* 162

12. Testimony tending strongly to show that there was "an actual separation in the nature of an estrangement" between the parties for more than a year and a half prior to the fatal accident, is sufficient to support the finding of the industrial commission that they were not living together at the time of the accident. *Ibid.*

Same: Insane widow of independent means.

13. In a proceeding to recover for the death of an employee, the evidence is *held* to show that his widow, whose mind had been impaired for years and who had spent much time in various hospitals but was living temporarily with a son in another city when her husband was killed, was living with her husband at the time of his death within the meaning of sub. 3 (a), sec. 2394—10. *Belle City M. I. Co. v. Rowland,* 293

14. A proper finding that decedent's widow was living with her husband at the time of his death establishes a conclusive presumption that she was solely and wholly dependent upon him for support, in view of sub. 3 (a), sec. 2394—10, notwithstanding she had property and an income of her own sufficient for her support. *Ibid.*

Jurisdiction of industrial commission to determine reasonableness of medical bills: Parties.

15. A physician's right to resort to the courts to enforce by action his claim against an employer for whom the physician has performed services in caring for an injured employee at the employer's request, is not affected by sub. 2, sec. 2394—15, giving the industrial commission exclusive jurisdiction to pass upon the reasonableness of medical bills of the em-

ployee, the statute applying only in cases where such issue is between employer and employee. *Nocr v. G. W. Jones L. Co.*

Award of commission subsequently affirmed as res adjudicata: Stare decisis.

16. Where an application made under the workmen's compensation act against a county and a village for the death of an employee terminated in an award against the village, which, except as to the amount, was affirmed on appeal, and upon the return of the record the industrial commission denied the request of the village that the county be made a party and entered a final award which was also affirmed on appeal, the former decision, although not *res adjudicata* because the county was not a party to the proceedings, was binding under the doctrine of *stare decisis;* and the judgment of the circuit court affirming an order of the industrial commission dismissing a subsequent petition of the village that the county pay part of the award is affirmed. *West Salem v. Industrial Comm.* 151

Findings of fact by industrial commission: Weight on review.

17. A determination of fact by the industrial commission on conflicting evidence is conclusive upon the courts, under sec. 2394—19. *Pawling & Harnischfeger Co. v. Mildenberger,* 146

18. An award of compensation by the industrial commission for a permanent partial disability equivalent to total blindness of one eye is sustained by the evidence. *Ibid.*

19. Though the findings of the industrial commission are conclusive upon the court if any reasonable view of the evidence supports them either directly or by fair inference, every finding of fact made must have some substantial evidence in its support, though not necessarily a preponderance; and a finding cannot be based on mere conjecture. *Lezala v. Jazek,* 532

20. The evidence in this case is *held* insufficient to support a finding of the industrial commission that a wife was interested in her husband's contracting business so that his employee was her employee as well. *Ibid.*

WRIT OF NE EXEAT. See NE EXEAT.